IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922.

No. 463.

GEORGIA RAILWAY & POWER COMPANY, ET AL., PLAINTIFFS IN ERROR AND PETITIONERS IN CERTIORARI.

vs.

TOWN OF DECATUR, DEFENDANT IN ERROR AND RESPONDENT IN CERTIORARI.

On writ of error and petition for certiorari to the Supreme Court of the State of Georgia.

MOTION BY PLAINTIFFS IN ERROR AND PETITIONERS IN CERTIORARI TO ADVANCE

WALTER T. COLQUITT
J. PRINCE WEBSTER
LUTHER Z. ROSSER
ATTORNEYS FOR MOVANTS,
PLAINTIFFS IN ERROR
AND
PETITIONERS IN CERTIORARI.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922

GEORGIA RAILWAY & POWER COMPANY, GEORGIA RAILWAY & ELECTRIC COMPANY,

R. C. Hackman, C. H. Knox, G. R. MacNamara, J. T. Braswell, C. A. Virgin, J. D. Malsby, C. M. Binder, J. L. Murphy, J. R. Hardin, H. M. Ashe, P. E. Davis, C. E. Bennett, W. E. Field, H. E. Hawn, David Hawn, F. McDonald, Jr., and J. C. Gorman

Plaintiffs in Error

and

Petitioners in Certiorari

vs.

TOWN OF DECATUR,

Defendant in Error

and

Respondent in Certiorari

Number 463

MOTION TO ADVANCE.

Georgia Railway & Power Company, et al., plaintiffs in error and petitioners for Certiorari, move that the above stated cases (docketed as No. 463) be advanced for hearing at an early date, for the following reasons:

1. The above stated case is pending on writ of error and also on petition and application for certiorari, directed to the Supreme Court of the State of Georgia.

2. The questions involved in said cases are as follows:

(a) Whether the municipal action of the Town of Decatur in 1903 was a rate ordinance or a rate contract. If a rate ordinance it is clearly and without dispute confiscatory and unconstitutional.

(b) Whether the said rate ordinance or contract is so discriminatory as to deprive intervenors and all other patrons of the street railway company not boarding or alighting from cars within the limits of the Town of Decatur of the equal protection of the law guaranteed by the 14th amendment to the Constitution of the United States.

(c) If the municipal action of the Town of Decatur in 1903 be held to be a rate contract; whether certain subsequent acts of the State of Georgia and orders of the Railroad Commission of the State of Georgia, enlarged, extended and imposed additional burdens upon the obligations of said contract and upon the obligations of prior contracts so as to render the said acts and the orders of the Commission unconstitutional and illegal in violation of Article 1 Section 10 of the Constitution of the United States.

(d) Whether the municipal action of the Town of Decatur of 1903 violated the 14th Amendment to the Constitution of the United States when construed by the State court as forcing the Georgia Railway & Power Company to continue to operate the North Decatur line when it is undisputed that to do so costs the company very much more than it receives from its fares, and is, therefore confiscatory.

(e) Whether certain acts of the State of Georgia, construed by the highest court of Georgia, as placing under the jurisdiction of the Railroad Commission of Georgia the authority to fix and establish rates in some cases and denying jurisdiction over rates in other cases, renders said acts unconstitutional in that it deprived petitioners of the equal protection of the law and fixed a discriminatory, confiscatory and illegal scheme of rates in violation of the 14th Amendment to the Constitution of the United States.

3. The matters here involved are of great public interest;

the constitutionality of several acts and of acts conferring jurisdiction over rates upon the Railroad Commission of the State of Georgia, as well as certain orders of the commission are involved; and the determination of these questions are of pressing importance, not only to the public service corporation, but to the State itself.

4. The early decision of this case is exceedingly important to the street railway company and to all its patrons, except such as enter and depart from cars in the limits of the Town of Decatur, for under the municipal action in question and under the orders of the Railroad Commission of the State of Georgia all the patrons riding upon any of the lines of the Georgia Railway & Power Company are charged a fare of 7 cents, except those boarding or alighting from cars within the corporate limits of the Town of Decatur (and the City of College Park) and these latter pay a fare of only 5 cents and enjoy transfer privileges entitling them to ride over all the street railway lines of the Georgia Railway & Power Company for a 5 cents fare, although all the other patrons are charged 7 cents.

It costs the Georgia Railway & Power Company more than double the fare of 5 cents to transport Decatur patrons and necessarily this over-cost is inflicted upon the Georgia Railway & Power Company or is borne by other patrons of the Street Railway Company. This palpable and gross discrimination is not only hurtful to the Georgia Railway & Power Company and its patrons, but is a constance source of annoyance to the public. The Railroad Commission of the State of Georgia has disapproved and expressly declared the Decatur rate to be both discriminatory and confiscatory and regretted their inability to correct it and urged correction thereof by the Town of Decatur.

The continuation of such discrimination "leads to consequences dangerous to public interest, peace and tranquility the extent of which it would be difficult in advance to perceive" (194 U. S. 517) and renders the determination of

the questions raised in this case of pressing importance to the State, as well as to the public service corporations.

WALTER T. COLQUITT

J. PRINCE WEBSTER

LUTHER Z. ROSSER

Attorneys for Movants
Plaintiffs in Error
and
Petitioners in Certiorari

TO:

TOWN OF DECATUR AND ITS COUNSEL

J. Howell Green; Harwell, Fairman & Barrett and Frank Harwell.

You are hereby notified that on the 2nd day of January, 1923, or as soon thereafter as the same can be presented, the foregoing motion and application for the advancement of the above named case, will be presented to the Supreme Court of the United States for appropriate action thereon.

This 12th day of December, 1922.

WALTER T. COLQUITT

J. PRINCE WEBSTER

LUTHER Z. ROSSER

Attorneys for Movants
Plaintiffs in Error
and
Petitioners in Certiorari

Service of the above and foregoing motion and application for advancement and of the notice of presenting the same

is hereby acknowledged, service and receipt of copy of said motion and notice are hereby accepted and acknowledged.

This 12th day of December, 1922.

J. HOWELL GREEN

HARWELL, FAIRMAN & BARRETT

FRANK HARWELL
Attorneys for Town of Decatur.

BRIEF FOR DEFENDANT IN ERROR

In The Supreme Court

OF THE

United States

OCTOBER TERM, 1922,

No. 463.

GEORGIA RAILWAY & POWER COMPANY, GEORGIA RAILWAY & ELECTRIC COMPANY, R. C. HACKMAN, et al.,
Plaintiffs in Error and Petitioners in Certiorari,

versus

THE TOWN OF DECATUR,
Defendant in Error and Respondent in Certiorari.

FRANK HARWELL and J. HOWELL GREEN,
Counsel for Defendant in Error.

(29,013)

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GEORGIA CODE SECTIONS

(29,013)

Supreme Court of the United States

OCTOBER TERM, 1922,

No. 463.

GEORGIA RAILWAY & POWER COMPANY, GEORGIA RAILWAY & ELECTRIC COMPANY, R. C. HACKMAN, ET AL.,

Plaintiffs in Error,

versus

THE TOWN OF DECATUR,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF GEORGIA.

Brief for Defendant in Error.

STATEMENT OF THE CASE.

On the 19th day of October, 1920, the Town of Decatur filed its equitable petition to the Superior Court of DeKalb County, Georgia, seeking an injunction against the plaintiffs in error, Georgia Railway & Power Company (hereinafter called the Power Company) and Georgia Railway and Electric Company (hereinafter called the Electric Company) to restrain them from raising the rate of fare on one of their lines of street railway running from the City of Atlanta to the Town of Decatur. (Transcript pp. 40-69.)

The petition was amended November 26, 1920. (Transcript pp. 69-189.) The Power Company and Electric Company filed their answer and cross petition November 20, 1920. (Transcript pp. 218-245.)

The Town of Decatur demurred to the answer and cross petition of the Power Company and the Electric Company November 26, 1920. (Transcript pp. 189-207.)

R. C. Hackman and other parties intervened, and were made parties defendant November 20, 1920. (Transcript pp. 254-258.) The Town of Decatur demurred to this intervention (Transcript pp. 215-217) and also filed its plea to same. (Transcript pp. 212-214.

An interlocutory hearing was had at this stage of the pleadings before the court and the restraining order granted by the court October 19, 1920 (Transcript p. 50) was continued of force. This order appears to be omitted from the record, but the opinion of the Supreme Court of Georgia affirming it is set out. (Transcript pp. 19-23.)

Before the case was again tried in the Superior Court of DeKalb County by the court and jury the Power Company and the Electric Company filed several amendments to their answer and cross petition. (Transcript pp. 245-253.)

The Town of Decatur, upon the filing of these amendments, renewed its demurrer and demurred further to each amendment. (Transcript pp. 207-212.)

The interlocutory hearing having taken place before the return or appearance term of the court, the demurrers were not pressed on until after the first decision of the Supreme Court of Georgia. On December 10, 1921, the general demurrer of Town of Decatur, as amended, was sustained with certain exceptions noted in the order. (Transcript p. 207.) On the same date the demurrer of Town of Decatur to the intervention of R. C. Hackman, et. al., was sustained and the intervention stricken. (Transcript p. 217.)

The case was then submitted to the jury by the court and after the introduction of the evidence referred to in pages 26-29 of the transcript the court directed the jury to find the issues in favor of Town of Decatur, and a verdict was rendered accordingly. (Transcript p. 258.) Upon this verdict a final decree

was entered in favor of the Town of Decatur enjoining the Power Company and Electric Company as prayed. (Transcript p. 258.)

To this verdict and decree the Power Company, the Electric Company and the intervenors excepted and sued out a bill of exceptions to the Supreme Court of Georgia. (Transcript pp. 23-39.) Upon this bill of exceptions a writ of error was issued by the court. (Transcript p. 39.) The decree of the trial court was affirmed by the Supreme Court of Georgia. (Transcript pp. 14-19.) This decision of the Supreme Court of Georgia was excepted to by the Power Company and other defendants in the trial court and is now before this court for review.

The pleadings and the evidence (the only evidence before the court being the pleadings introduced and certain affidavits and admissions of defendants in the trial court—Transcript pp. 26-29) show substantially the following facts, to-wit:

That during the month of December, 1902, and prior thereto, the Electric Company owned and operated by electricity three street car lines between the City of Atlanta and Town of Decatur, one extending from near the center of Atlanta to Decatur on the south side of the Georgia Railroad, the other two running from near the center of Atlanta to Decatur on the north side of the Georgia Railroad.

That sometime prior to 1902 said street car lines were under different ownerships, but finally all three of said lines were acquired by the Electric Company;

That the most northerly of said street car lines entered said Town of Decatur on its western corporate limit and passed over various streets of said Town (Transcript p. 41) to and beyond its then eastern corporate limit, then turned north, then back west, and connected with said line again near the Court House, forming a loop in said Town of Decatur;

That many residents of said Town of Decatur to which no other street car line was convenient were served by this line;

That on December 29, 1902, said Electric Company, without notice to the Town of Decatur, commenced to tear up said most northerly street car line within the corporate limits of said town, with a view to abandoning the operation of the same;

That on the same date a restraining order was granted by the court, upon the petition of said town, preventing the removal of the tracks and other equipment of said street car line (Transcript p. 52—there seems to be some confusion in the dates, the date appearing in the transcript as December 27th, but in fact the 29th);

That soon after said restraining order was granted the Electric Company sought with said town an adjustment of the controversy without further litigation, and urged that said town permit the Electric Company to tear up said line of street railway and abandon the operation of the same, urging as a reason therefor that, if allowed to do so, said Electric Company **could** and **would** give to the citizens of the Town of Decatur better street car facilities upon another parallel line between Atlanta and Decatur running immediately north of the Georgia Railroad, then known as the Atlanta Rapid Transit Line, but owned and operated by the Electric Company; that after protracted negotiation between the Electric Company and the Mayor and Council of said town, said Mayor and Council finally consented for the Electric Company to remove said most northerly line, then known as Atlanta Railway Company line, but owned by the Electric Company, and an ordinance was passed to that effect on March 3, 1903, and accepted and agreed to by the Electric Company in a contract between said town and said Electric Company, dated April 1, 1903 (Transcript pp. 53-58), which, among other provisions, bound the Electric Company "To never charge more than five cents for one fare upon it's main Decatur line, above referred to as the Rapid Transit line, for one passenger and one trip upon its regular cars from the terminus of said line in the City of Atlanta to the terminus of the same in the Town of Decatur, or from the terminus of said line in the Town of Decatur to the terminus of the same in the City of Atlanta, and the trip either way shall include the entire loop in the Town of Decatur, hereinafter described, though a greater fare may be charged when passengers are transported between the hours of

12 o'clock midnight and 5 o'clock A. M."; the said Rapid Transit line being then described as forming a loop in said Town of Decatur and in part passing over the same streets as said Atlanta Railway Company line; and said contract also provides that said Electric Company is within five years to double track said main Decatur line, and the franchise for this double track is granted by said town in said contract;

That upon the execution of this contract, the injunction proceedings by the Town of Decatur against the Electric Company were settled and an order passed by the court entering them settled and dismissed. (Transcript p. 58. The record is confused here. The order is printed in immediate connection with the repealing clause of the ordinance above referred to, whereas it should follow "Exhibit C.");

That said contract between the town and the Electric Company has been fully executed on the part of the town; that said Electric Company, pursuant to the provisions of said contract, did tear up, remove and abandon the operation of said Atlanta Railway Company line, to the great inconvenience of the citizens of said town living along said line and have been saved the expense of operating and maintaining said abandoned line during all these eighteen years;

That during all the time from April 1, 1903, to October 5, 1920, said Electric Company or its lessee, the Power Company, has operated said Rapid Transit line and has never sought to charge more than five cents for one fare for one passenger for one trip, but on October 5, 1920, the Electric Company and the Power Company notified the Mayor and Council of said town that on and after October 20, 1920, the fare between Atlanta and Decatur on said Rapid Transit, or main Decatur, line, would be seven cents (Transcript p. 58);

That prior to said notice the Power Company applied to the Railroad Commission of Georgia for permission to increase the fare on said main Decatur line from five to seven cents, which application was denied by the Commission on the ground that the contract of 1903 prevented them from taking jurisdiction of the matter (Transcript pp. 165, 166);

That thereafter, to-wit, on August 23, 1918, the Power Company filed a petition in the Superior Court of Fulton County, seeking by mandamus to compel the Railroad Commission of Georgia to assume jurisdiction of the question of rates on the main Decatur line, and others operated by the Power Company (Transcript pp. 76-183), which petition was answered by the Railroad Commission (Transcript pp. 184-186); that the mandamus was denied by the court (Transcript p. 182); that this ruling was excepted to by the Power Company and carried to the Supreme Court of Georgia for review (Transcript pp. 186, 187); which reversed the trial court in part, but sustained him in so far as he held that the Railroad Commission had no jurisdiction to fix rates on said main Decatur line, holding that the contract of 1903 is a valid subsisting contract (See 149 Ga., p. 1);

That said Electric Company and said Power Company seek to violate said contract of 1903 by raising the fare on said main Decatur line from five to seven cents, but do not offer to restore the status that existed when the contract of 1903 was entered into, that is, do not offer to restore the removed and abandoned street car line, although retaining all the benefits derived by saving the expense of operating and maintaining said abandoned line since 1903; and still retain possession of the franchise to double track on the streets of Decatur and still have their lines upon the streets and operate their cars over these streets under the franchise granted the Electric Company to double track by the contract of April 1, 1903.

The contentions of the Electric Company and the Power Company set up in their answer are as follows:

That neither the town, nor the Electric Company, had any right or power to enter into the contract of 1903; that they had no right to fix fares; that said parties had no right to contract for the discontinuance of the Atlanta Railway Company line; that the agreement to settle the suit restraining the Electric Company from removing and discontinuing said street car line was illegal and void and furnished no consideration for said contract; that said contract was never legal and binding, but if it was ever legal and binding, it was terminated by the notice given by the Electric Company and the Power Company to the Town of Decatur on

October 5, 1920; that said contract of 1903 is an attempt to fix fares not only in the corporate limits of Decatur, but in territory outside of said limits, and is ultra vires and void;

That since the contract of 1903 was entered into the corporate limits of Decatur have twice been extended, so as to include a considerable portion of said main Decatur line that was outside of said corporate limits in 1903; that the contract of 1903 cannot be applied to this added territory, and that to so construe the Acts of 1907, 1914 and 1916 is to impair the obligation of the contract in violation of the Constitution of the United States;

That under the provisions of the contract of 1903 the five cents fare applies only to passengers boarding cars at the terminus of the line in Atlanta or the terminus of the line in Decatur and not to passengers boarding cars at intermediate points;

That the provision in said contract of 1903 for giving a transfer "upon the payment of one full fare" means a seven cents fare as fixed by the Railroad Commission of Georgia, and not a five cents fare;

That said contract of 1903 is indefinite as to parties and is, therefore; unenforceable;

That said contract is indefinite as to the time it is to run, and is, therefore, subject to termination on notice, and that the same was terminated by said notice of October 5, 1920;

That conditions have so changed since said contract of 1903 was made, and the cost of labor and material have advanced so, that a five cents fare does not cover the cost of transporting a passenger from Atlanta to Decatur;

That said five cents rate hampers and interferes with defendants in the performance of their duties to the public and discriminates against patrons of defendants living in other communities than Decatur; in view of the fact that the Railroad Commission of Georgia has fixed a seven cents fare for passengers boarding defendants' cars outside of the Town of Decatur;

That the action of the Railroad Commission fixing fares on defendants' lines outside of the Town of Decatur at six cents, and later at seven cents, is the action of the State of Georgia and that the contract of 1903 is thereby abrogated;

That the Railroad Commission of Georgia by order required defendants to increase the quantity and quality of the service on said main Decatur line, and that to enforce said five cents fare would be to confiscate defendants' property, and that, therefore, this action of the Commission, which defendants claim is the action of the State, nullifies said contract of 1903;

That if said Act of 1907 is so construed as to deny the Railroad Commission of Georgia power to regulate fares on said main Decatur line, but at the same time give said Commission power to regulate the service on said line so as to increase its cost, said Act is unconstitutional and void; or at least that portion of it which provides: "That nothing herein shall be construed to impair any valid, subsisting contract now in existence between any municipality and any such company, and provided that said Act shall not operate as a repeal of any existing municipal ordinance";

That defendants offer to surrender their franchise within the Town of Decatur, if said contract of 1903 is held valid.

The amendments to defendants' answer and cross petition only elaborate the above contentions.

R. C. Hackman and others intervened as parties defendant and alleged that to enforce the five cents fare provision of the contract of 1903 would discriminate against them, inasmuch as they live without the corporate limits of the Town of Decatur and pay seven cents for riding on the main Decatur line, and they adopt all the allegations contained in the answer and cross petition of the Electric Company and the Power Company.

ANALYSIS OF ASSIGNMENTS OF ERROR.

An analysis of the various assignments of error shows that all fall into one of two classes, those claimed to violate article 1, Section 10 of the Constitution of the United States, and those claimed to violate the 14th amendment to the constitution of the United States.

Class 1: There are several assignments of error falling within this class, some stated affirmatively, some negatively, but they may all be concisely stated as follows:

That the decision of the Supreme Court of Georgia construing the contract between the Town of Decatur and the Georgia Railway and Electric Company; "To never charge more than five cents for one fare upon its" (plaintiffs in error's) "Main Decatur line * * * for one passenger and one trip upon its regular cars from the terminus of said line in the City of Atlanta to the terminus of the same in the Town of Decatur" violates Article 1, Section 10 of the Constitution of the United States, which provides that "No State shall * * * pass * * * any * * * law impairing the obligation of contracts * * *;" it being claimed that this provision of the Constitution is violated in the following particulars:

In that (a) having held the contract of 1903 valid, the Court should not have held that the State Railroad Commission of Georgia, under the Act of 1907, had the jurisdiction and power to increase the quality and quantity of service rendered for said five cents fare (4th assignment, page 8 of transcript of record); (b) by so construing said contract as to make the five cents fare provision applicable to passengers boarding the cars at other points than the termini in Atlanta and Decatur, plaintiffs in error claiming that the five cents fare applies only when passengers board the cars at one of the termini of said line (5th assignment, page 8 of transcript of record); (c) by applying the five cents fare provision of said contract to territory added to the Town of Decatur subsequently to the execution of said contract; (d) by not applying an alleged contract entered into between the County of DeKalb and the Georgia Railway and Electric Company to this added territory instead of the contract with the Town of Decatur and the Electric Company (6th assignment, page 9 of transcript of record).

Class 2: There are also several assignments of error in this class, some stated affirmatively, some negatively, but briefly they are as follows:

That the decision of the Supreme Court of Georgia so construes the contract of 1903 between the Town of Decatur and Georgia Railway and Electric Company as to violate the 14th Amendment of the Constitution of the United States, which provides that "no State shall * * * deprive any person of * * * property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws" in the following particulars:

In that to require compliance with the provision of the contract, or ordinance of 1903, confiscates the property of the Electric Company and the Power Company without due process of law and denies the equal protection of the laws (a) because neither of said parties to the contract had any right, power or authority to make binding contracts as to fares; (b) because said parties are prohibited from making contracts for fixed fares, irrevocable and unlimited as to time by the Constitution of the State of Georgia set out in Sections 6389, 6464 and 6563 of the Code of Georgia, 1914 (see 1st assignment, page 5, transcript of record); (c) because the Court did not hold that, if the contract of 1903 was ever valid, it had ended prior to the pending suit (1) by complete performance, (2) by adequate notice of termination, (3) by the action of the State of Georgia, through the commission, requiring compliance with the five cents fare provision of said contract, (4) requiring the giving of the transfers on payment of said five cents fare, (5) by requiring an increase in the quality of service to be rendered over and above that provided in said contract, (6) by applying said five cents fare provision to the extended limits of the Town of Decatur (Acts of the General Assembly of Georgia, 1914, page 703 and 1916, page 681) (See 1st assignment, c to e, inclusive, page 6 of transcript of record); (d) denies to intervenors and all other patrons of the Power Co. and Electric Co. except Decatur patrons, the equal protection of the laws in that it requires them to pay seven cents for the same or less service than that for which Decatur patrons are paying five cents (see assignment 2, page 6 of the transcript of the record); (e) because the construction placed by the Supreme

Court of Georgia upon the Act of the Georgia General Assembly, 1907, page 73, as amended by the Act of 1919, page 94, denies to plaintiffs in error the equal protection of the laws and fixes a discriminatory and illegal scheme of rates by authorizing and empowering the Railroad Commission of Georgia to change rates of fare fixed in all contracts except valid, subsisting contracts in existence on August 23, 1907 (see assignment 3 (a), page 7 of the transcript of record); (f) in that said Act of 1907, as construed by the Court, denies to the Railroad Commission of Georgia the right, power and authority to change the five cents fare provision of the contract of 1903, but confers jurisdiction on said Commission to increase the quality and quantity of service to be rendered and to require the issuing of transfers upon the payment of said five cents fare (see assignment 3 (b) page 7 of transcript of record); (g) in that the Act of 1907, as construed by the Court, as against the individual intervenors, fixes an illegal and discriminatory scheme of rates by authorizing the Railroad Commission of Georgia to fix a seven cents rate of fare for less or similar service rendered to intervenors while maintaining in force a five cents rate to Decatur patrons for a greater or similar service (see assignment 5, page 8 of transcript of record); (h) in that the contract of 1903, as construed by the Court denies to the Power Company and the Electric Company the right to terminate and cease to operate all of its lines in the Town of Decatur and compels said companies to operate said lines without compensation and confiscates their property (see assignment 7, page 9 of transcript of record).

LAW BRIEF.

I.

THIS COURT IS WITHOUT JURISDICTION IN THIS CASE, THE SUPREME COURT OF GEORGIA HAVING RENDERED THE DECISION COMPLAINED OF UPON AN INDEPENDENT NON-FEDERAL QUESTION, BROAD ENOUGH TO MAINTAIN THE JUDGMENT.

This case was first taken to the Supreme Court of Georgia from the granting by the trial court of an interlocutory injunction, and affirmed.

Ga. Ry. & Power Co., et al. vs. Decatur, 152 Ga. 143 (Transcript pages 19 to 23.)

In that decision the Supreme Court of Georgia adhered to its ruling in the mandamus case 149 Ga. 1, holding the contract of 1903 in controversy to be a valid subsisting contract but affirmed the case upon the independent non-Federal ground that the injunction was properly granted because the Georgia Railway & Power Co. was without authority to fix the rate which the Town of Decatur sought to have enjoined, saying:

"But the Court is further of the opinion that, independently o fthe ruling made in the case referred to (149 Ga. 1), the Georgia Railway & Power Co. was without authority to fix the rate which the plaintiffs in the court below sought to have enjoined, and that consequently the court did not err in granting the interolcutory injunction." (Transcript page 19.)

The trial court after this ruling sustained the general demurrers of the Town of Decatur, to answer and cross bill and amendments thereto of plaintiffs in error and struck them (Transcript pages 207 and 217), directed a verdict and entered the decree making the injunction permanent. (Transcript pages 258 and 29). The plaintiffs in error again carried the case to the Supreme Court of Georgia from this last ruling (Transcript page 23 and the decision thereon by the Supreme Court of Georgia is the one now complained of as being in conflict with Art. I. Section

10 and the 14th amendment of the Constitution of the U. S. (Transcript pages 5 to 10.)

This last decision b ythe Supreme Court of Georgia is found in 153 Ga. 329, Transcript page 15. It adopts the rulings in the former decision (152 Ga. 143, Transcript page 19) as the law of the case, reciting the ruling upon the independent non-Federal ground above quoted, and saying that the ruling in the 152 Ga. 143 is not only res-adjudicata of every issue involved in the present hearing but is the "law of the case" in the case now under review.

So that by adoption of the rulings in the first decision, the decision complained of is based upon the independent non-Federal question above stated. This independent ruling is based upon the want of authority in the Power Co. to fix fares under the Constitution and statutes of Ga. See the discussion of this question by the Supreme Court of Ga. 152 Ga. 146, Transcript page 21. And we think that this independent ruling is so manifestly a non-Federal question that we will not further discuss it in this brief. It is equally apparent that the independent ruling above referred to is broad enough to maintain the judgment, that is to authorize the grant of the injunction restraining the Company from charging the 7 cents fare which the Company had arbitrarily fixed.

This Court, therefore, has no jurisdiction in this case under the repeated rulings of this Court, the general rule on this subject being stated as follows:

"In order to give this court jurisdiction on writ of error to the highest court of a state in which a decision could be had, it must appear affirmatively not only that a Federal question was presented for decision by the highest court of the State having jurisdiction, but that its decision was necessary to the determination of the cause, that it wa sactually decided, or that the judgment as rendered could not have been given without deciding it, and where the decision complained of rests on independent grounds not involving a Federal question and broad enough to maintain the judgment, the writ of error will be dismissed by this Court without considering any Federal question that may also have been prtsented."

See note, page 733, to Section 237 of the Judicial Code, 5 Federal statutes annotated, and authorities there cited. See also:

Eustis et al. vs. Bolles et al. 150 U. S. 361, 37 L. Ed. 1111 and cases cited.

The California Powder Works vs. Davis, 151 U. S. 389, 38 L. Ed. 206.

Howat et al. vs. Kansas, advance sheets 66 U. S. (L. Ed.) 322,324.

The writ of error in this case must therefore be dismissed for want of jurisdiction.

II.

THE DECISION RENDERED BY THE SUPREME COURT OF GEORGIA ON THE GRANT OF AN INTERLOCUTORY INJUNCTION IN THIS CASE (152 GA. 143: TRANSCRIPT PAGE 19) wAS A **FINAL ADJUDICATION** OF THE CASE UNDER THE DECISIONS OF THE GEORGIA SUPREME COURT FROM WHICH PLAINTIFFS IN ERROR COULD HAVE SUED OUT A WRIT OF ERROR TO THE SUPREME COURT OF THE U. S., BUT DID NOT. NOT HAVING EXCEPTED TO THAT DECISION OF THE GA. SUPREME COURT, THEY ARE CONCLUDED BY IT AND THE DECISION COMPLAINED OF IN THIS CASE SHOULD BE AFFIRMED.

"A judgment of a trial court granting or refusing an injunction, when the same depends entirely upon a question of law, is, upon its affirmance by the Supreme Court, a final adjudication of such question."

Ingram vs. Mercer University 102 Ga. 226, 228.
Ga. Ry. & Power Co. vs. Decatur 153 Ga. 329. (Transcript page 15) and cases cited. See the discussion of this question by the Supreme Court of Ga. (Transcript pages 16, 17 and 18.)

The former decision (152 Ga. 143) disposed of the whole case on the merits and left nothing to the judicial discretion of the trial court.

"A judgment of a trial court granting or refusing an injunction, where the same depends upon a question of law, is, upon its affirmance by the Supreme Court a final adjudication of such question."

"The rulings of the Supreme Court, upon the interlocutory order of the trial judge granting an injunction becomes the law of the case as to the particular case." (153 Ga. 329, Transcript page 15.)

The Supreme Court of Georgia in the decision now complained of said that its former decision **was the law of the case.**

"A decision of the highest State court, which, on a second appeal, affirmed the judgment below on the ground that its former decision was the law of the case, is not reviewable in the Federal Supreme Court, where the Federal question relied upon to confer jurisdiction was involved in the first decision, and that decision was final, in the sense of the judicial Code § 237, governing writs of error to the Supreme Court."

Rio Grande Western Railway Co. vs. Stringham et al. 239 U. S. 44, 60 U. S. (L. Ed.) 136.

In view of the fact that there is very little evidence in this case outside of the facts stated in the pleadings of plaintiff, which were read as evidence, the other evidence consisting of a few affidavits and admissions of counsel for parties, and in view of the further fact that the defensive pleadings were practically all stricken on demurrer, we presume that the Court will decide this case chiefly by a consideration of the pleadings, and will decide whether or not the allegations of fact contained in the defensive pleadings stricken by the trial court could authorize the relief sought by the plaintiffs in error under the two sections of the United States Constitution referred to in their various assignments of error. We, therefore, deem it unnecessary to discuss the demurrers separately from the merits of the case and will consider them together.

III.

It seems to us that the first question to be determined is the question was there, or was there not, a contract? Was the contract of 1903 (transcript pp. 53-58) valid and binding on the parties, or was it void ab initio? In determining this question, we apprehend that this court will give great weight to the decisions of the Supreme Court of Georgia, and follow those decisions unless they are clearly in conflict with the Constitution of the United States.

In Yazoo & Miss. Valley R. R. Co. vs. Wirt Adams, 181 U. S., 580, 45 L. Ed., 1011, this Court says:

> "A construction of statutes adopted by the court of last resort in that state will be adopted by the Supreme Court of the United States, even in a case where that court may exercise an independent judgment, if there is any reasonable doubt on the question."

See also:

Board of Liquidation of the City Debt vs. State of Louisiana on the relation of Lucretia B. Wilder, et al., 179 U. S., 622 (2), 45 L. Ed., 347 (2);

Burgess vs. Seligman, 107 U. S., 20 (8), 27 L. Ed., 359 (8);

Freeport Water Co. vs. Freeport, 180 U. S., 595, 596, 45 L. Ed., 687.

IV.

CONTRACT OF 1903 FIXING A MAXIMUM RATE OF FIVE CENTS IS VALID AND BINDING ON DEFENDANT COMPANIES UNTIL THE LEGISLATURE SEES FIT TO EXERCISE ITS PARAMOUNT AUTHORITY TO REGULATE SUCH RATES.

(a) The identical contract involved in this case (Transcript pp. 53-58) has been before the Supreme Court of Georgia three times, and has each time been upheld by that Court as a valid subsisting contract. First, it was passed on in the case of Geor-

gia Railway and Power Company vs. Railroad Commission of Georgia, 149 Ga., page 1. The Power Company had previously filed a petition to the Railroad Commission of Georgia, praying to be allowed to increase its rate of fare in the City of Atlanta and the suburban towns of Decatur, East Point and College Park. The Railroad Commission held that under the Act of 1907 of the Georgia Legislature, Acts of 1907, page 72, it was without jurisdiction to consider the petition in view of certain contracts existing between the Power Company, or its lessor, the Electric Company, and the cities named at the time of the passage of the Act of 1907, which contracts still subsisted at the time said petition was filed; section five of the Act of 1907, providing: "That nothing herein shall be construed to impair any valid subsisting contract now in existence between any municipality and any such company, and provided that this Act shall not operate as a repeal of any existing municipal ordinance * * *"; the Act, among other provisions, extending the jurisdiction of the Railroad Commission, so as to include street railroads and street railroad corporations. The Power Company then filed a mandamus proceeding in the Superior Court of Fulton County to compel the Railroad Commission to take jurisdiction of its petition. The mandamus was denied, and the decision of the Supreme Court of Georgia above cited reviewed the judgment in this mandamus case, which is set out in full as "Exhibit J" to the amendment to the petition of Town of Decatur (Transcript pp. 76-189). The Supreme Court of Georgia, in passing on the Atlanta and East Point ordinances, page 9, says: "We have gone carefully through these ordinances conferring certain rights and franchises upon the street railroad companies mentioned, have considered the terms of what might be called the consent contract in the consolidating ordinance, and we cannot find that there were the elements of a contract existing in view of the provisions of the consolidating ordinance." But in passing on the Decatur contract the Court makes a distinction, and on page 11, says: "The contracts with the municipalities of College Park and Decatur stand upon a different footing. Those contracts were in existence on the 23rd day of August, 1907, *and are still subsisting contracts*". (Italics ours.) The Supreme Court next passed on this contract in the case of Georgia Railway and Power Company et al. vs. Town of Decatur, 152 Ga., page 143 (see also Transcript pp. 19-23). In this case the Power Company requested

that the decision in 149 Ga., page 1, be reviewed and overruled, but the court adhered to its former ruling and upheld the contract again. The Court again passed on this contract in the case of Georgia Railway and Power, et al. vs. Town of Decatur, 153 Ga., page 329, and again upheld it, the decision in this last case being the one now under review by this Court and appearing on pages 15-19 of the transcript.

The terms of the contract in question were embodied in an ordinance passed by the Mayor and Council of the Town of Decatur, March 3, 1903 (erroneously stated in the transcript as 1904), which ordinance was made a part of a solemn contract entered into between the Electric Company, the lessor of the Power Company, and the Mayor and Council of the Town of Decatur, April 1, 1903. (Transcript pp. 53-58.)

By the terms of this contract, the Town of Decatur granted to the Electric Company a franchise to construct its double track upon the streets of the Town of Decatur, and also gave its permission to the Electric Company to take up and abandon the said Atlanta Railway Company line *upon condition that the Electric Company should never charge more than five cents for one fare upon its main Decatur line*, referred to as the Rapid Transit line, for one passenger, and one trip upon its regular cars from the terminus of said line in the City of Atlanta to the terminus of the same in the Town of Decatur, or from the terminus of said line in the Town of Decatur to the terminus of the same in the City of Atlanta, and that the trip either way should include the entire loop in the Town of Decatur, above described, though a greater fare might be charged when passengers were transported between the hours of 12:00 o'clock midnight and 5:00 o'clock A. M., and that said Georgia Railway & Electric Company should grant one transfer ticket upon the payment of one full fare for the purpose of giving one continuous ride from any point within the Town of Decatur upon said Rapid Transit line to any point within the City of Atlanta on any of its lines in said city, and vice versa, which should not result, however, in carrying the passenger on a parallel line or in the same general direction from which he came, provided such transfer was requested at the time of the payment of the fare and provided that the passenger should abide by such reasonable rules and regulations as the Company might make.

The contract provided that

> In *consideration of the benefit* to said party of the second part from discontinuance, abandonment and removal of the said line of railway hereinbefore referred to, and in further *consideration of the benefits* to be derived by it from the performance on the part of the Town of Decatur of the provisions undertaken to be performed by it under said ordinance, said party of the second part hereby contracts and agrees with the said Town of Decatur that it (the said Georgia Railway & Electric Company) will, upon its part, do and perform all things specified in said ordinance to be done and performed by it, and will keep and observe the conditions and terms of the said ordinance."

One of the benefits derived by the Electric Company from the Town of Decatur was the granting of the franchise as specified in the contract to construct its double track upon the streets of Decatur.

That the franchises, benefits and privileges granted to the Electric Company were *granted only upon condition* that the wit: To never charge more than five cents for one fare upon its main Decatur line, etc., and to grant one transfer ticket upon the payment of one full fare, etc.

Such contracts have been repeatedly upheld by this Court and the courts of last resort in the various States, and this contract is valid and binding both upon the Town of Decatur and the Electric Company and the Power Company until the Legislature of Georgia sees fit to exercise its paramount authority to regulate such rates. See the following authorities:

Duluth St. Ry. Co. vs. Railroad Commission of Wisconsin, 161 Wis. 245, 152 N. W. 887;

Boerth vs. Detroit City Gas Company, 152 Mich. 654, 116 N. W. 628;

Benwood vs. Public Service Commission, 75 W. Va. 127, 83 S. E. 295;

Muncie Natural Gas Co. vs. City of Muncie, 160 Ind. 97, 60 L. R. A. 822;

Mercantile Trust Co., et al. vs. Collins Park, et al., 101 Fed. 347;

City of Sedalia vs. Public Service Commission of Mo., 204 S. W. 497;

People vs. O'Brien, 18 N. E. 692 (N. Y.);

Quinby et al. vs. Public Service Commission, 119 N. E. 433 (N. Y.);

Public Service Commission et al. vs. Westchester St. Ry. Co., 99 N. E. 536 (N. Y.);

Niagara Falls vs. Public Service Commission, 128 N. E., 247 (Affirms Quinby case).

City of New York vs. Nixon et al., 179 N. Y. Sup. 82;

City of Manitowoc vs. Manitowoc & N. Traction Co., 145 Wis. 13, 129 N. W. 925. This contract fixed the rate of fare between certain cities;

City of Superior vs. Douglas County Telephone Co., 141 Wis. 363, 122 N. W. 1023;

Village of Warsaw vs. Gas Co., 182 N. Y. Sup. 73;

State vs. Home Tel. Co., 172 Pac. 899;

Carlisle Ry. Co. et al., 91 Alt. 960 (2);

International Co. vs. Rand, 171 N. Y. Sup. 193 (3) 197;

N. Y. Co. vs. Subway Co., 235 U. S. 179;

Columbus Co. vs. City of Columbus, Ohio, 6 A. L. R. 1648 (note p. 1659), 249 U. S. 399;

Weatherbee et al. vs. Denham Ry. Co., 95 N. E. 81. Fixed fares of 3 towns;

People vs. Suburban Co., 49 L. R. A. 650 (1) (2) (3).

"Power conferred upon a Public Service Commission to regulate rates fixed by statute does not include power to regulate those fixed by contract between a municipal corporation and a street railway occupying its streets, as embodied

in the railway company's franchise, which, under the Constitution, can be granted only on consent of the local authorities."

Quinby vs. Public Service Commission, 223 N. Y. 244, 119 N. E. 433, 3 A. L. R. 685.

1. "Statutes of Ohio creating Public Utilities Commission do not confer authority on the Commission to change rates fixed by the terms of valid contract, made by a public utility with a municipality, in the exercise of powers clearly conferred upon it.

2. "When the terms of a valid ordinance granting a franchise to a street or interurban railway company are accepted by the grantee, such action constitutes a contract between the parties. As long as the Company retains its franchise and operates its road thereunder, its terms must control."

Interurban Railway, etc. vs. Public Utilities Commission, 98 Ohio St. 287, 120 N. E. 831, 3 A. L. R. 696.

Guilford Wate Co., 108 At. 446;

Searsport Water Co., 108 At. 452;

Warsaw vs. Pavilion Natural Gas Co., 187 N. Y., Sup. 350;

Muskegon Etc. Co. vs. Grand Rapids Co., P. U. R. 1921, C, 583.

Chicago Ry. Co. vs. Chicago, 126 N. E. 585.

As to (2) above see

City of Cincinnati vs. Public Utilities Commission, 98 Ohio St. 320, 121 N. E. 688, 3 A. L. R. 705 (1) and (9);

10 Corpus Juris 673 (11);

12 Corpus Juris 1015 (Notes 95 and 96);

Alleghany vs. Millville, 28 Atl. 202;

Almand vs. Railway Co., 108 Ga. 417;

City Council of Augusta vs. Railway Co., 150 Ga., 529;

25 R. C. L. (note 7), Shreveport Traction Co. vs. Shreveport, 47 So. 40, 129 A. S. R. 345;

P. U. R. 1916 E. 525; P. U. R. 1920 E. 536;

Board of Education vs. Public Serv. R'y. Co. P. U. R. 1918 A. 577;

City of Cleveland vs. Cleveland City Ry. Co., 194 U. S. 517, 48 L. Ed., 1102.

In this case the city sought to reduce the fare after the contract was made, and this Court held that the action of the city impaired the obligation of the contract, and that it must stand as made. If the city cannot abrogate the contract, neither can the company.

(b) Under the Constitution of Georgia, 1877, Article 3, Section 6, Paragraph 20 (Code of 1910, Sec. 6448), no street passenger railway can be constructed within the limits of any incorporated town or city without the consent of the corporate authorities, and under Section 2600, Code of Georgia, 1910 (Parks Ann. Code, 1914), providing for the incorporation of street railroads, it is provided that no street railroad so incorporated "shall be constructed within the corporate limits of any incorporated town or city without the consent of the corporate authorities; and provided further, that all such street railroad companies incorporated under this division shall be subject to all just and reasonable rules and regulations by the corporate authorities, and liable for all assessments and other lawful burdens that may be imposed upon them from time to time."

The Electric Company was incorporated under this law (Transcript, pp. 121-124), and, therefore, under the constitutional provision above referred to and the section of the code quoted, is bound by the terms, conditions and restrictions contained in the grant of its franchise to construct its railroad in the Town of Decatur. The contract of 1903 grants a franchise to double-track the main Decatur line of street railway and imposes restrictions, one of which is the limitation of fares to not more than five cents. This franchise was accepted, and thus became binding on the town and the Electric Company.

"Where the right of a municipality to refuse its consent to the operation of a street railway in its streets is an absolute one, its power, in the first instance, to impose conditions is unlimited."

25 R. C. L. 1143 (30);

Mercantile Trust & Deposit Co. vs. Collins Park & Belt R. R. Co., 101 Fed. 347, construing this provision of the Georgia Constitution;

Chicago General Railway Company vs. City of Chicago, 176 Ill., 253, 66 L. R. A., 959, holding that "a street railway company is not denied the equal protection of the laws, or due process of law, by giving it the privilege of using the streets only on conditions different from those which have been imposed on other companies."

City of Detroit vs. Fort Wayne & Belle Isle R. Co., 20 L. R. A., 79;

The Richmond, Fredericksburg & Potomac Railroad Company vs. City of Richmond, 96 U. S., 521, 24 L. Ed., 734;

Oklahoma City vs. Oklahoma Railroad Company, 16 L. R. A. (N. S.), 651, and note.

In discussing the power of the municipality to make the contract under review, the Supreme Court of Georgia in the mandamus case above cited, 149 Ga., 5, say:

"We readily assent to the proposition that the regulation of passenger tariffs, the fixing of fares upon street railways, as well as upon steam railyways, is a matter falling within the police power, and that neither the Legislature of the State nor the legislative body of any municipality can, by ordinance or contracts, abridge the exercise of the police power of the State, but we do not think that in all cases and in reference to every subject which might fall within the police power of the State, it is incompetent for a municipality or other corporation to make a contract in refernce to a subject matter when the State has not seen fit to exercise the police power in reference thereto."

Then referring to the constitutional provision above quoted, the Court says:

> "Under the Constitution of this State, Art. 3, Sec. 7, Par. 20 (Civil Code, Sec. 6448), the General Assembly cannot authorize the construction of any street passenger railway within the limits of an incorporated town or city without the consent of the corporate authorities. Under such provisions the city authorities may withhold their consent for the construction of a street railroad upon any of the streets of the municipality. It would seem that if they can do this they might impose conditions upon which a railroad company might construct its tracks in the streets, and enter into a contract with the corporation as to the conditions upon which it should be permitted to construct a railway within the limits of the municipality."

The Court says further, on page 7:

> "We do not base our opinion that a street railroad company and a municipality may, under certain circumstances, contract with reference to rates of fare entirely upon that part of the Constitution which provides that the Legislature shall not authorize a street railroad company to construct its railways in the limits of a municipality without the consent of the municipal authorities. We think that where the State has not exercised its police power and is not seeking to exercise its police power over the subject of fares upon street railroads, the municipality and the street railway may enter into contracts on this subject that will be valid; but the right of the municipality to refuse absolutely its consent to the construction of a street railway within its limits, and the constitutional and statutory provisions in regard thereto strengthen us in the view that it is competent for the municipality and the street railroad company to enter into contracts upon this subject."

And it is said by the Supreme Court of Georgia in Atlanta Ry. & Power Co. vs. Atlanta Rapid Transit Co., 113 Ga., 484, that:

> "Our constitution in paragraph 20 of Section 7, Article 3, declares that the General Assembly shall not authorize the construction of any street passenger railroad within the

limits of any incorporated town or city without the consent of the corporate authorities. But when a corporation to duly construct such a railway has been created, and the right to do so conferred, it is within the power of the corporate authorities of the city, in whose streets it is proposed to be constructed, to refuse its admission altogether, as well as to confine it to certain streets and routes, and to impose, as a condition precedent to such construction, such reasonable terms as the corporate authorities, looking to the interest of the citizens, may deem best."

See also:

Milwaukee Ry. Co. vs. R. R. Com., 153 Wis., 592, L. R. A. 1915 F., 744, affirmed in Milwaukee Ry. Co. vs. R. R. Com., 238 U. S., 174, 59 L. Ed., 1254.

In this case a rate agreed upon between the city and the railway company was modified by the State through the action of the R. R. Commission, but in upholding the action of the Commission, the Court said the contract was good between the parties until the State saw fit to exercise its paramount authority.

In the case of Manitowoc vs. Manitowoc & N. Traction Co., 145 Wis. 13, 140 Am. St. R., 1056, which is cited and followed by this Court in the Milwaukee case, supra, the Court says:

"When a city, with authority to refuse its consent to the use of its streets by interurban cars, grants to the railway company the right to run cars in its streets on the condition that the Company shall carry passengers between that city and another city at a specified rate, the agreement is binding between the parties; but if no specific authority has been conferred upon the city to make such an agreement the State may interfere whenever public weal demands. Yet until the State sees fit to exercise its paramount authority to modify the rates (which in this case it has not done), the contract is in force between the parties."

The foregoing authorities dispose of the assignment of error that the Town of Decatur had no power to make the contract in question.

V.

CONTRACT OF 1903 MUST STAND AS LONG AS DEFENDANT COMPANIES RETAIN POSSESSION OF AND ENJOY THE VALUABLE FRANCHISES, RIGHTS AND PRIVILEGES WHICH THEY OBTAINED BY THIS CONTRACT. THE GENERAL ASSEMBLY MAY TERMINATE THE CONTRACT AS TO RATES, BUT NOT THE DEFENDANTS.

(a) The defendant companies claim (See Sections 29, 37, 38 and 39 of cross bill, Transcript pages 223, 228) that the contract being indefinite, fixing no period of time when it is to end, they may revoke it on notice.

Such is not the law in reference to this contract and under the circumstances in this case as shown by the facts.

The facts show that he Electric Company was permitted to take up this Atlanta Railway Company line, and that in pursuance of this contract, it did take up this Atlanta Railway Company line, and that the franchise was granted to the electric company to lay its double track in the streets of the Town of Decatur, upon condition never to charge more than five cents and to grant transfers as provided in said contract, and that the Power Company as lessee of the Electric Company is now in possession of franchises, rights and privileges granted under and by virtue of this contract, and now enjoys those valuable franchises, rights and privileges. It appears that this Atlanta Railway Company line was a line which was practically parallel with said main or North Decatur line, extending from Decatur to Atlanta. Said defendant companies have been saved the expense of maintenance and operation of this line for 18 years. It is not proposed to restore this line, and, as a matter of fact, it would be impossible for defendant companies to restore this line which extended from Atlanta to the Town of Decatur. By the taking up of this third line, defendant companies deprived the Town of Decatur and its citizens of this additional line extending from Decatur to Atlanta. They have during this period of 18 years been saved the cost of maintenance and operation of this line. This saving has inured to the benefit of defendant companies and doubtless saved them hundreds of thousands of dollars, which has gone to increase their dividends.

It is not insisted that there is anything in the contract itself which gives defendant companies the power to revoke the contract.

We insist that the contract must stand until the Legislature chooses to take jurisdiction and to terminate the contract. We insist that as long as defandant companies are in possession of and enjoy the franchises, rights and privileges which they have obtained under this contract, they must abide by it.

The following authorities are cited to sustain the proposition above stated:

> "Every contract is prima facie permanent and irrevocable, and it lies on a person who says that it is revocable or determinable to show either some expression in the contract itself, or something in the nature of the contract, from which it is reasonably to be implied that it was not intended to be permanent and irrevocable, but was to be in some way or other subject to determination.
>
> "Contracts fixing no period of duration—Where a contract is not for personal services, or does not require the imposing of special confidence, and does not fix a limit of its duration, it cannot be regarded as terminable except by mutual consent. So where a contract is not revocable at the will of either party or otherwise limited as to its duration by its express terms, or by the inherent nature of the contract itself, it is presumably intended to be permanent and perpetual in the obligation it imposes."
> **13 Corpus Juris 604.**
>
> "A contract between the owner of a tract of coal land and a railroad company, by which the landowner agreed to develop mines on his land to a stated capacity, and the company agreed to build a branch line to the mines, and to purchase the coal produced at the ruling price of a certain other coal, which contained no provision as to its duration, was not terminable at the will of one party, but was permanent so long as the stipulated production was maintained, unless sooner terminated by consent of both parties."

McKell vs. Chesapeake & O. Ry. Co., 175 Fed. 321, 20 Ann. Cases 1097, 1102. (See note page 1104.)

See also the following cases city by McKell case, supra:

Page 330—

Great Northern Ry. Co. vs. Manchester, Sheffield, etc., Ry Co., 5 De Gex & Sm. 138;

Llanery Ry. & Dock Co. vs. London & N. W. Ry. Co., L. R. 8 Ch. App. 942;

Franklin Tel. Co. vs. Harrison, 145 U. S. 459, 12 Sup. Ct. 900, 36 L. Ed. 776;

Robson vs. Mississippi Logging Co. (C. C., 43 Fed. 364, affirmed 69 Fed. 773, 16 C. C. A. 400;

Western Union Tel. Co. vs. Pennsylvania Co., 129 Fed. 849, 64 C. C. A. 285, 68 L. R. A. 968.

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Stonega Coal Co. vs. L. & N. R. R. 106 Va. 23, 55 S. E. 551, 9 L. R. A. (N. S.) 1184.

"The defendant has obtained and is now in possession of valuable public rights, and so long as it holds them it must fulfill its obligation." (Page 551.)

Public Service Commission, Second Dist., vs. International Railway Co., 172 N. Y. Supp. 551.

1. "A grant by a municipality to a gas corporation for the use of the streets, when accepted, becomes a contract, not a mere privilege or gratuity."

2. "The regulation of rates for gas in the franchise of the company is an exercise of the police power through a municipality as a political subdivision of the State, and the State can thereafter modify the rates without impairing the obligation of a contract, since no contrcat can defeat legitimate governmental authority."

3. "A company cannot increase the rates of charges for gas as fixed by its franchise by filing a new schedule of

rates with the Public Service Commission, but can charge such increased rates only after the State has exercised its police power to change the franchise in that respect."

(Page 75.) "When and by whom shall this police power be exercised to modify an existing franchise rate? The evident answer is only by the State through its regularly constituted authorities. It would seem most illogical that a party to such franchise contract, desiring to aivoid its obligation, might on its own motion, and without the consent of State authority, repudiate its obligation under the franchise, and undertake to exercise the police power alone vested in the State. But that in effect is just what the defendant in this case has undertaken to do. It is true it has petitioned the Public Service Commission for leave to increase its rates for gas furnished consumers, and that proceeding is now pending before that body; but until a final decision in that proceeding is rendered, and for the time being, the defendant proposes to charge consumers the increased rate specified in its amended tariff schedule. In other words, it proposes to be a law unto itself for the time being, and until the Public Service Commission finally acts. We do not think that position can be sustained upon principle, and that until the Public Service Commission decides that the defendant is entitled to a higher rate for gas it is bound by the franchise rates agreed on in the grants given by the village plaintiffs. It is for the State to determine whether a modification of the franchise rate shall be made, and not for the defendant."

Page (76.) "We think the plaintiffs have established the right to the injunction asked. Our decision is based on the theory that the terms of franchises such as the defendant enjoys in the villages of Perry and Warsaw cannot be disregarded by the defendant until the franchises are modified by the State, acting through its Public Service Commission, under the police powers reserved to the State."

Village of Warsaw et al. vs. Pavilion Natural Gas Co.

Village of Perry et al. vs. Same. 183 N. Y. Supp. 73.

(Page 981.) "I start with this proposition, that prima facie every contract is permanent and irrevocable, and that it lies upon a person who says that it is revocable or determinable to show either some expression in the contract itself, or something in the nature of the contract, from which it is reasonably to be implied that it was not intended to be permanent and perpetual, but was to be in some way or other subject to determination. No doubt there are a great many contracts of that kind: A contract of partnership, a contract of master and servant, a contract of principal and agent, a contract of employer and employed in various modes, all of these are instances of contracts in which, from the nature of the case, we are obliged to consider that they were intended to be determinable. All the contracts, however, in which this has been held are, as far as I know, contracts which involve more or less of trust and confidence, more or less of delegation of authority, more or less of the necessity of being mutually satisfied with each other's conduct, more or less of personal relations between the parties. But I am of opinion that no such consideration applies to a case in which there is a grant or an agreement in the nature of a grant, of a way leave, or of running powers, which is only another mode, according to my view of it, of expressing a way leave."

Western Union Telegraph Co. vs. Pennsylvania Co., 129 Fed 849, 68 L. R. A. 968.

"The city being a creature of the State, may contract for a supply of water for an unlimited period, in the absence of constitutional provisions forbidding such a contract."

(Page 741.) "We are not called upon to consider now whether the State has reserved authority to regulate and control the terms and conditions of service. The State has not yet undertaken to do it, in this case. The State so far has said only that he parties might contract on such terms as they might agree upon. And so far as the contract was within the authority given by the charter, it must be held to be valid. The legislature placed no limit upon the length of time for which they might contract, and therefore we cannot. Whether the legislation was wise or unwise was

a question of public policy. It was a question for the legislature. And a legislative determination of public policy, within constitutional limitations, is conclusive upon the courts. Cities, as well as corporations, are creatures of the State. And we know of no constitutional provision which forbids a contract between city and company for a supply of water for an unlimited period."

City of Belfast vs. Belfast Water Co., 115 Me. 234, 98 Atl. 738.

See also

Atlantic City Waterworks Co. vs. Atlantic City, 48 N. J. 378, 6 Atl. 24.

"An ordinance passed by a village council, granting a franchise to an interurban railway company to construct its line through the village, contained the following provision: 'Should the Village of Pleasant Ridge be annexed to the City of Cincinnati, the rate of fare charged for a ride in either direction between one point in said village and the Cincinnati terminus shall not exceed five cents.' The company thereafter duly accepted the franchise and constructed, maintained and operated its line thereunder. Subsequently the village was annexed to the city. Held, the acceptance of the grant by the company constituted a binding contract between the parties. As long as the company retains the franchise and operates its road thereunder, its terms must control."

(Page 190.) "But in this case we are dealing with the subject of contract. It implies a meeting of minds."

"But we are not able to see how the court can alter the terms of the contract in this case as the parties made it. The only thing the court can do is to enforce the contract as it finds it, and to hold that as long as the company continues to operate the franchise it must submit to the terms thereof."

The street railway company contended the village was wholly without authority to prescribe or contract for fares beyond the municipal limits, etc.

Interurban Ry. & Terminal Co. et al. vs. City of Cincinnati, 93 Ohio St. 108, 112 N. E. 186.

State vs. Home Telephone Co., 172 Pac. 899 (2).

In the case of Franklin Telegraph Company vs. Harrison, 145 U. S. 459, 36 L. Ed. 776, the court, referring to the contract between the telegraph company and Harrison Bros., in which no limitation was expressed, on page 780, first column, L. Ed., says: "*They simply purchased the use without limitation as to time*, after the ten years, for themselves and licensees, of a wire erected on the poles of the telegraph company, between Philadelphia and New York." (Italics ours.)

(b) There is a line of decisions holding that a grant by a city to a street railway company of a franchise to use the streets of the city for railway purposes, without fixing a time limit, is against public policy and void; but the New York court and the courts of last resort of some other States hold that such a grant creates a property right, and is perpetual, unless a time limit is fixed in the grant. This court has adopted the latter rule. The leading New York case is People vs. O'Brien, Receiver, 2 L. R. A. 255. For Federal cases see:

City of Owensboro vs. Cumberland Telephone & Tel. Co., 230 U. S. 38, 57 L. Ed. 1389;

City of Covington vs. South Covington & Cincinnati Ry. Co., 246 U. S. 413, 62 L. Ed. 802, 2 A. L. R. 1099;

and see elaborate rule on p. 1122, stating the rule in Federal courts and collecting the authorities;

Northern Ohio Traction & Light Company et al. vs. State of Ohio, 245 U. S. 574, 62 L. Ed. 481;

City of Louisville vs. Cumberland Telephone & Telegraph Company, 224 U. S. 649 ,56 L. Ed. 934;

Old Colony Trust Co. vs. City of Omaha, 230 U. S. 100, 57 L. Ed. 1410;

Grand Trunk & W. R'y Co. vs. City of South Bend, 227 U. S. 544 (3 & 4), 57 L. Ed. 633 (3 & 4).

If, then, the grant of a franchise to use the streets of a city for railway purposes vests in a public service corporation a perpetual property right, when no time limitation is expressed in the granting ordinance, which is protected by the Federal Constitution, it would seem that the public service company would be bound by all the terms, stipulations and conditions imposed upon it in the granting ordinance, as a consideration for making the grant, as in the case at bar, the provision to "never charge more than five cents for one fare," etc., especially when the terms of the ordinance have been reduced to a contract and signed by both the public service company and municipality, as in the case at bar, and we submit that the authorities already cited fully support this proposition. Under these authorities, the Town of Decatur cannot revoke the right of the Electric Company to use the streets covered by the grant, nor can the Electric Company raise the rate of fare on the main Decatur line, for the provision that the Electric Company shall "never charge more than five cents," etc., is a condition annexed to the grant and became a part of the contract entered into under the constitutional provision requiring the permission of the city before a street car line can be built within the corporate limits. But certain parts of this contract deal with subjects within the police powers of the State, and, while such parts cannot be altered by the immediate parties to the contract, they are always subject to the regulatory control of the legislature, which has plenary power over all matters pertaining to the police power. Art. 4, Sec. 2, Par. 2, Constitution of Georgia, Park's Code 1914, Section 6464, which provides that "the exercise of the police power of the State shall never be abridged, nor so construed as to permit corporations to conduct their business in such a manner as to infringe the equal rights of individuals, or the general well-being of the State."

This court has frequently recognized the distinction between the two classes of provisions in contracts of the kind here involved, one dealing with strictly property rights, the other with regulatory subjects under the police power. (Grand Trunk W. R. Co. vs. South Bend, 227 U. S. 553, 57 L. Ed. 639, and cases cited.) The Supreme Court of Georgia in the case of Geo. R'y & Power Co. vs. R. R. Com. of Ga., 149, p. 5, in passing on this identical contract recognizes this distinction when it says: "We

readily assent to the proposition that the regulation of passenger tariffs, the fixing of fares upon street railrways, as well as upon steam railways, is a matter falling within the police power, and that neither the legislature of the State nor the legislative body of any municipality can, by ordinances or contracts, abridge the exercise of the police power of the State; but we do not think that in all cases and in reference to every subject which might fall within the police power of the State it is incompetent for a municipality or other corporation to make a contract in reference to such subject matter when the State has not seen fit to exercise the police power in reference thereto." It will thus be seen that the construction placed upon this contract upholds it as between the Electric Company and the Town of Decatur, protects the property right of the Electric Company as to the use of the streets and protects the public by enforcing the provision as to fares, until such time as the legislture thinks the rate of fare should be changed, when it will call into play the police power of the State and modify the fare, either by raising it or reducing it, as the public interest and fair dealing with the Electric Company may require. This construction of the Supreme Court of Georgia applying the constitutional provision of Georgia in reference to the public power to the contract under review is similar to the repeated rulings of this court that the States may legislate upon subjects dealing with interstate commerce when Congress has not acted upon the same subjects, but that the instant Congress exercises its dormant power on such subjects any State legislation thereon is superceded. So the contract between the Electric Company and the Town of Decatur as to rates is binding on both parties until the State exercises its dormant police power. We submit that this construction by the Supreme Court of Georgia of the contract under review prevents any possible conflict with the Federal Constitution by retaining in the legislature full control of the provision in reference to fares, so that it may be modified whenever the public interest or justice to the Electric Company may require it. If we are correct in this position, then the decision of the Supreme Court of Georgia is controlling on the question. See Old Colony Trust Co. vs. City of Omaha, 230 U. S. 100, 57 L. Ed. 1410, where it is said: "Decisions of the State courts relating to matters of local law, such as the construction of the State Constitution and statutes, and the powers

of local municipal corporations, must be regarded by the Federal courts as controlling when their application involves no infraction of any right granted or secured by the Constitution of the United States."

(c) The Electric Company obtained valuable concessions in consideration of its agreement to "never charge more than five cents for one fare," etc., which it and its lessee, the Power Company, still retain and enjoy, and have retained and enjoyed for over twenty years. Not only was the right granted to lay a double track in the streets of Decatur, but permission was given the Electric Company by the town to take up the tracks of the Atlanta Railway Company line and abandon its operation, which was done. It would be unconscionable to allow the Electric Company to accept a perpetual franchise to use the streets of Decatur, abandon the operation of the Atlanta Railway line, thus saving the expense for all time of operating and maintaining two lines when the company claimed it needed only one, and not force it to comply with the rate provision of the contract, tract, which was the real consideration passing from the Company to the town.

Before the Supreme Court of Georgia, the plaintiffs in error relied strongly on the case of the City of San Antonio vs. San Antonio Public Service Co., 255 U. S. 547. But there is a clear distinction between that case and the case at bar. In the San Antonio case the ordinance provided that the railway company "shall charge 5 cents fare for one continuous ride," etc., whereas the contract under review requires the railway company "to never charge more than five cents," etc., the first fixing an absolute fare, five cents, the other fixing a maximum fare only, and not giving an absolute right to charge five cents. There was no grant of a "privilege or immunity," but a contractual limitation upon the power of the Electric Company.

Georgia Railroad vs. Smith;

70 Ga., 699 (2); affirmed in Georgia Railroad vs. Smith, 128 U. S. 174, 32 L. Ed. 377.

Again, there is a very material difference between the constitutional provision in the San Antonio case, which is as fol-

lows: "No irrevocable grant of special privileges or immunities shall be made; but all privileges and franchises granted by the legislature, or created under its authority, shall be subject to the control thereof"; and the provision of the Georgia Constitution, which is as follows: "No bill of attainder, ex post facto law, retroactive law, or law impairing the obligation of contracts, or making irrevocable grants of special privileges or immunities, shall be passed."

The Texas Constitution deals with "privileges and immunities" granted by the legislature or created under its authority, but the Georgia Constitution deals only with "laws passed," as the context clearly shows.

The Town of Decatur in annexing to its ordinance, which was made a part of the contract of 1903, the condition that the Electric Company should "never charge more than five cents," etc., was not acting under the authority of the legislature, but independently of the legislature and under the Constitution itself, which forbids the construction of a line of street railway within its limits without its consent.

Again no *special* privilege or immunity was granted in the contract under review, for, in order that a privilege or immunity may be *special*, it must be *exclusive*, which is not true of the grant in the case at bar.

> **Old Colony Trust Co. vs. City of Omaha, 230 U. S. 115-116, 57 L. Ed. 1416.**

Franchise to use streets not being exclusive is not a special privilege or immunity.

> **Omaha Electric Light & Power Co. vs. Omaha, 172 Fed. 494-498.**

Neither the power of a municipality to contract with a third party for the construction and operation of waterworks, street railways, or the public utilities, nor the right of such a third party under such a contract, constitutes a special privilege or immunity, within the meaning of those terms in Section 16, Art I, of the Constitution of Nebraska which prohibits the leg-

islature from making irevocable grant of special privileges or immunities.

Omaha Water Co. vs. Omaha, 147 Fed. 1, 77 C. C. A. 267, 12 L. R. A. (N. S.) 736;

8 Ann. Cas. 614 (citing Walla Walla vs. Walla Walla Water Co., 172 U. S. 1-17, 43 L. Ed. 341

Detroit vs. Detroit Citizens St. R. Co., 184 U. S. 368-389; 46 L. Ed. 592.)

The Supreme Court of Georgia in Georgia Railway & Power Co. vs. R. R. Com. of Georgia, 149 Ga. 1; Georgia Railway & Power Co. vs. Town of Decatur, 152 Ga. 143; Georgia R'y & Power Co. vs. Town of Decatur, 153 Ga. 329, has already passed on all questions as to the Constitution of Georgia under review here and upheld the contract. See Transcript p. 245, where additional sections of the Georgia Constitution were invoked by amendment.

Moreover, in San Antonio, the city by its charter, Sec. 100, existing at the time of the passage of the ordinance of 1899 had the power "exclusively * * * to regulate everything connected with city railroads," in other words the power to regulate fares. Hence the court properly construed the ordinance of 1899 which stated that the company "shall charge a five cents fare" as a regulatory ordinance rather than a contract.

In other words, wherever the power exists in a municipality to regulate fares by ordinance, by charter or statute, and an ordinance is passed fixing a rate, the courts generally construe it as an exercise of the dominant, rate regulating power, rather than as a contract. This is the reasonable view because the city would not likely bind itself by an irrevocable contract rate when it has the dominant power to regulate the rate at its own volition. The court in the San Antonio case notes this, when it says:

> "Indeed the result is persuasively established by the ruling in the Altgelt case to the effect that if the contract right were conceded, there would, in view of the constitutional restriction, be such an inevitable conflict between that

right, and the dominant power to regulate as to render the contract right inoperative, and therefore to cause it to perish from the mere fact of admitting its conflict between that right and the dominant power to regulate as to render the contract right inoperative, and therefore to cause it to perish from the mere fact of admiting its conflict with the authority to regulate."

This view of the San Antonio Ordinance of 1899 that it was not a contract but only a regulatory ordinance was strengthened by the fact that in the ordinances thereafter passed by the city it was never referred to as a contract but always as a regulation.

In the instant case, there is an agreement between the parties; it has all the elements of a contract in the first place. Again the city has the power to contract as to rates but not the power to regulate rates, just the reverse of the power of the City of San Antonio. Regulation under the Constitution of Georgia is lodged solely in the legislature or by delegation in its agent the Railroad Commission. The Georgia provision does not prohibit privileges granted by contract but only by law. The Texas Constitution prohibits grants by contract as well as by law. The Georgia provision prohibits only special privileges. The Texas provision refers to any privilege or franchise.

Moreover the agreement of 1903 is a contract or nothing. It must be upheld as a contract if upheld at all. If void as to the rate feature, then the whole is void and the grants from the city to the company, that is the franchises, are void. It does not lie in the mouth of the company to say that the rate feature is void and yet retain possession of the privileges which it obtained by the agreement.

The provision of the Constitution (Georgia Code, 6389) was enacted for the benefit of the State and its agents, that is towns and cities, and it therefore does not lie in the mouth of the company to whom the claimed special privilege is granted by contract to set up its invalidity by reason of the grant to it of this privilege when the grantor does not claim it and while the company retains possession of the franchises and consideration which it obtained from the grantor by reason of the contract.

Furthermore, a city in Georgia can not by contract fix a rate irrevocable by the State, since under the Constitution of Georgia the power to regulate rates is lodged in the General Assembly and the exercise of the police power of the State shall never be abridged. The State may at any time revoke the rate provision feature in the contract by repealing the proviso in the act of 1907 and thus conferring jurisdiction on the Railroad Commission, hence there could be no conflict between the rate provision in the contract and the constitutional provision above referred to that no law shall be passed making irrevocable grants of special privileges.

Further the Supreme Court of Georgia in holding this to be a valid contract necessarily held it to be not prohibited by and not in conflict with any constitutional provision of the State of Georgia.

> "Its validity was attacked in a number of ways, and many constitutional objections were raised thereto; but when this court reaffirmed the ruling in the mandamus case and held that, independently of the mandamus order, the trial court did not err in granting the interlocutory order, it was an adjudication of every atack upon the validity of the contract in question, even though the numerous objections may not have been specifically ruled upon in the opinion of the court."
>
> **Ga. R'y & P. Co. vs. Decatur, 153 Ga. 334, and cases cited.**

This court will follow the Supreme Court of Georgia in the construction of the Constitution and statutes of the State of Georgia.

VI.

THERE IS A MARKED DISTINCTION BETWEEN CONTRACTS WHICH ARE CLAIMED TO BE INVIOLABLE AND THOSE WHICH ARE NOT; THAT IS, THOSE WHICH THE LEGISLATURE MAY TERMINATE AT ANY TIME.

In the case of inviolable contracts, that is, those which it is claimed the Sovereign has no power to end, the authorities seem to hold that there must be an express grant of authority from

the State, and that it must be made for a length of time not unreasonably long.

But where the contract is made subject to the sovereign power of the State, in the exercise of its police power, to end it at any time, it may be made for an indefinite time, and will continue so long as the party obtaining valuable franchises and rights thereunder retains possession of and enjoys those franchises and rights. The parties themselves may agree to end it, or the State may step in and terminate it. The distinction is well expressed in the following case:

> "To construe subdivision 9 of Section 1828 R. S. 1898, as authorizing railroad companies to make contracts for rates binding upon the State when it resumes rate-making power, would be to hold that the legislature could part with an atribute of sovereignty. This it cannot do. In a democracy there can be no abdication. Sovereignty is not subject to a perpetual gift, grant or barter. A perpetual grant *under* sovereign power may be made, but not a perpetual grant *of* sovereign power. The railroad company was but an agency of the State in regulating rates, and as such it had no authority to enter into a contract not subject to modification or revocation by the State."
>
> **Minneapolis, etc., Ry. Co. vs. Manasha W. W. Co., 150 N. W. 413.**

This contract by the Town of Decatur is a grant *under* sovereign power. It is under the control of the State. The State may end it at any time.

Where a town attempts to exercise the sovereign power of the State and to make a grant in a contract which is claimed to be inviolable, that is, a grant *of* sovereign power, the sovereign must give this power expressly and the grant must be for a time not unreasonably long.

The case cited by plaintiffs in error in their brief, page 28, and cases like it, are easily distinguished from the instant case in this important respect, namely, that in those cases the Railroad Commission was given full power over rates. There was no

proviso in those cases, as in the act of August 23, 1907 (Code of Georgia, Sec. 2662), excepting contracts with municipalities from the jurisdiction of the Railroad Commission of Georgia.

In the Mitchell case, the city claimed to have an inviolable contract, that is, a contract which the State itself could not abrogate or annul. The Mitchell case is an attempt to set up a contract against the assertion of its police power by the State. If the legislature of Georgia should ever repeal the proviso in the Act of August 23, 1907, excepting municipal contracts from the jurisdiction of the Railroad Commission, and thereby confer full power on the Railroad Commission over all rates, and the Railroad Commission should exercise its jurisdiction thus conferred by fixing a rate on the North Decatur line, and the Town of Decatur should then attempt to set up an inviolable contract against the police power of the State of Georgia, then the Mitchell case, supra, and others like it cited by plaintiffs in error, would be applicable and pertinent, but until this happens these cases are as far from the instant case as the East is from West.

In the instant case there is no attempt to set up a contract against and in opposition to the exercise of the police power by the State. On the contrary the assertion of the contract right by the Town of Decatur is in harmony with the State. The contest here is between the municipality and the Street Railway, and the State is lined up with the municipality. The State of Georgia marches side by side with the municipality.

VII.

THAT A RAILWAY COMPANY CANNOT OPERATE ITS RAILWAY AT A CERTAIN RATE OF FARE WITHOUT LOSS DOES NOT CONSTITUTE AN EXCUSE FOR FAILING TO DISCHARGE ITS DUTY TO THE PUBLIC, ARISING ON CONTRACT VOLUNTARILY ASSUMED.

(a) In the first place there are no allegations of fact in the answer and cross bill, except a bare conclusion that the North Decatur line is maintained at a loss. No facts are shown to that effect, and no court could or would act upon a statement not supported by any facts.

It does not appear that any record is kept by the Company showing what percentage of the public boarding the cars on the main Decatur line ride through from Decatur to Atlanta, how many of them ride from a point within the corporate limits of Decatur, to some other point within the limits of Decatur, or how many boarding the cars within the corporate limits of Deecatur ride to some point intermediate between Atlanta and Decatur. In other words, there are no allegations that show what percentage of the traffic on this line in reference to Decatur is through traffic or what percentage of it is local, and without these facts, it cannot be determined whether a five-cent fare is profitable or unprofitable. Some passengers ride for a short distance, others for a long distance, and the average distance of all the passengers must be taken into consideration in determining whether a line pays or not.

In the second place, it will be presumed that when the Railroad Commission fixed the rate at seven cents upon other lines upon the application of the Power Company for an increase that the Commission took into consideration the whole body of rates upon all lines of defendant companies, and fixed such a rate on the lines over which it had jurisdiction as would be fairly compensatory to the Company in the operation of its entire system.

In other words, the rate upon any one line cannot be considered and would not be considered by the Commission without taking into consideration the rate upon other lines. The whole body of rates would be considered by the Commission, and not those on a segregated line. If any such rate thus fixed by the Commission was not fairly compensatory, or was confiscatory, the Company might have appealed from the finding of the Commission and reviewed it in the courts. That was its remedy. Not having done so, it cannot complain now.

In the third place, we insist that the Company having voluntarily entered into this contract cannot repudiate this contract because the conrac may be unprofitable or because they may have to operate this one line at a loss.

The proposition stated at the heading of this subdivision is sustained by abundant authorities. Courts do not make con-

tracts for parties. It is the duty of the courts to enforce contracts. The proposition stated at he heading of this subdivision is quoted from the case of Public Service Commission vs. International Railway Company, 172 N. Y. Sup. 551.

See also the following citation of authorities to the same effect:

"Where a telephone franchise does not authorize the company to make charges for installation and removal of telephones, the fact that if the Company was not allowed to make such charges, bankruptcy would result does not authorize the court to substitute another contract for that incorporated in the franchise."

Greenville Telephone Co. vs. City of Greenville, 221 S. W. 995.

"A franchise contract between a city and a street railroad company for a term of 25 years, fixing the rate of fare, is binding on both parties throughout the term, and cannot be terminated by the company on the ground that the continuance of normal labor conditions was an implied term, and that the abnormal increase in wages caused by the war and the action of the War Labor Board renders further performance at the fixed rate of fare impossible, because it would bankrupt the company. In such case, while such abnormal conditions were not contemplated by either party, the company might have guarded against them in the contract."

Burr et. al. vs. City of Columbus, Ohio et al., 256 Fed. 261.

"A section in a street railroad franchise providing that, in consideration of the rights conveyed to the grantee, he should not charge more than five cents for a single ride, is a contractural obligation, and not merely a regulative provision."

"The wisdom of insistence on a franchise contract fixing street railroad fares, which would bring disaster to the

railroad company, is not a question for the courts to decide."

Meridian Light & Ry. Co. vs. City of Meridian et al., 265 Fed. 765.

See also

Columbus Ry. & Power Co. vs. Columbus, 249 U. S. 399, 6 A. L. R. 1648, and note page 1659.

"Neither the Constitution of the State or the Nation gives the courts the power to save anyone from a valid contract merely because it will entail great or even irreparable injury to perform according to the contract."

"Chancery cannot by injunction interfere with a contract fixinfi rates of fare chargeable by a street railroad, on the ground that the contract is improvident."

Ottumwa Ry. & Light Co. vs. City of Ottumwa et al. (Iowa), 173 N. W. 270.

"That a railway company cannot operate its railway at a certain rate of fare without loss does not constitute an excuse for failing to discharge its duty to the public, arising on contract voluntarily assumed."

"In regard to the modification or abrogation of contract obligations voluntarily assumed, public service corporations stand on the same footing as individuals."

"That the employees of a public service corporation demand wages which the corporation regards as excessive does not relieve it from its contract obligations to the public."

Public Service Commission, Second Dist., vs. International Ry. Co., 172 N. Y. Supp. 551.

"A public utility need not be assured a fair and reasonable return on its investments over and above the actual cost of providing adequate, efficient and safe service, when

the conditions are grossly abnormal on account of a war, and are necessarily temporary."

Salt Lake City et al. vs. Utah Light & Traction Co., 173 Pac. 556, 3 A. L. R. 715. (See note page 730.)

"An injunction restraining violation by a street railway of the conditions of its franchise cannot be denied merely because such conditions render its business unprofitable."

Public Service Commission vs. Westchester St. Ry. Co., 99 N. E. 536, 538.

See also

Muscatine Lighting Company vs. City of Muscatine, 256 Fed. 929 (3) and (5).

The reasonableness of any single rate should be determined with reference to the general schedule of rates on all lines of defendant companies. Also, the fares, charged on one line must be considered in connection with the fares charged on other lines of the entire system. In other words, the courts cannot segregate one line, and determine whether the rate on that line is compensatory or not. The reasonableness or unreasonableness of a single rate cannot be determined without a general schedule of rates. Courts cannot fix rates, but may restrain the Commission from enforcing an unreasonable body of rates.

Southern Railway Co. vs. Atlanta Stove Works, 128 Ga. 208 (3) and (6).

It will be presumed that the Commission in fixing the rate of seven cents upon other lines of defendant companies considered the entire body of rates on its entire system. If defendant companies were dissatisfied with the rate so fixed it could review that finding of the Commission in the courts.

4 R. C. L. 653; Trammell vs. Dinsmore, 102 Fed 794; affirmed, 183 U. S. 115.

Powhatan Coal Co., 171 Fed. 723; affirmed, 178 Fed. 266.

All parts of railroad system profitable and unprofitable should be embraced in the computation of rates.

Groesbeck vs. Duluth, etc., Ry. Co., 250 U. S. 607.

Puget Sound Traction Company vs. Reynolds, and others constituting Public Service Commission, 61 Law Edition 1325, 244 U. S. 574.

In this case, the following rule is laid down:

> "Whether an order of a Public Service Commission requiring street railway passengers to be carried beyond the limits of the particular franchises covering those lines, and at a reduced rate, is confiscatory or otherwise arbitrary within the inhibition of U. S. Const., 14th Amend., is not to be determined with reference to earning and operating expenses of the lines in question, separately considered, where such lines are and have long been operated as parts of a system."

See also numerous authorities on this proposition cited in the Attorney General's brief in this case, at the bottom of first column, page 1328, Law Edition.

If the seven-cent rate fixed by the Commission on all defendant company's lines, except the main or North Decatur line and the College Park line, was not compensatory when the entire system of defendant companies is considered, defendant's remedy was to take prompt steps to review this ruling of the Commission in the courts. Not having done so, they cannot now raise this issue collaterally in this proceeding.

It will be clearly seen from the foregoing citation of authorities in this brief that there is no legal defense set up by defendant companies that since the order of the Commission fixing a rate of seven cents and asking an increase of service in certain respects on defendant companies' lines that the maximum rate agreed upon in the contract of 1903 with the Town of Decatur is (1) not compensatory, is confiscatory, and without due process of law and in violation of the Constitution of the United States, and of the Constitution of Georgia (Civil Code, Section 6358,

6359), (Transcript p. 235), or (2) that it hampers defendants and interferes with their duty to other patrons. (Transcript p. 229.)

See also:

Southern Iowa Electric Co. vs. City of Chariton, 255 U. S. 539 (2 & 3), 65 L. Ed. 764 (2 & 3).

VIII.

THE DEFENDANT COMPANIES ARE ESTOPPED FROM QUESTIONING THE REASONABLENESS OF THE RATE FIXED BY CONTRACT WITH THE TOWN OF DECATUR.

It does not lie in the mouth of defendant companies after obtaining the consent of the Town of Decatur to the removal of the Atlanta Railway Company line, and after enjoying the privilege of not having to maintain this line for 18 years, and after obtaining the franchises and rights under this contract, of which they are still in possession, to now question the reasonableness of the rate fixed by that contract.

"Publ. St. 1882, c. 113, Sec. 43, provides for the fixing of fares by the directors of a street railway, section 44 provides that on certain applications the Board of Railroad Commissioners shall revise and regulate fares, etc., and section 45 provides that nothing in the two preceding sections shall authorize a company or the board to raise the fare above the rate established "for a locality" by agreement made as a condition of location or otherwise, except by mutual agreement with the local authorities. St. 1898, p. 743, c. 578, sec. 13, in force October 1, 1898, in effect withdrew the right of municipal officers to impose conditions regulating and restricting fares, but confirmed prior locations and continued them, subject to regulations of conditions in force. Held that, in view of the statutes, the municipal officers, granting a location under which a street railway was organized prior to October, 1898, could impose restrictions as to the fares not unlawful in themselves and

the reasonableness thereof could not be thereafter questioned by a street railway company organized on the basis of such location and restriction.

"By Publ. St. 1882, c. 113, sections 43-45, the legislature intended to give the Board of Railroad Commissioners power to regulate the fares charged by street railway companies, whether or not fixed in accordance with restrictions imposed by municipal officers, subject to the condition that fares so established for a municipality should not be raised, except by mutual agreement with such officials; and even if the fares between a city granting a location and another city in the State was not established "for a locality" within the meaning of the statute, a street railway company cannot complain of the fares fixed in granting a location when no attempt has been made to have the fares revised by the Railroad Commissioners.

Page 511. "And it may be added that we do not understand it to be contended that this restriction created any undue burden upon the street railway company when it was first imposed. Neither the defendant's answer nor the agreed facts go further than to state that the charge of half rates yields at present less than the cost of carriage, by reason of the increase in the last six years of the cost of maintaining and operating the defendant's railway. But we can pass only upon the validity of the restriction as originally imposed and assented to by the defendant's predecessor in title and voluntarily assumed by the defendant."

The restrictions required half fare for pupils attending school in Worcester.

Murphy et al. vs. Worcester Consol. St Ry. Co., 85 N. E. 507.

Page 114. "It is plain that the constitution and the statute cited give the absolute power to the city, and it does not lie in the mouth of the plaintiff, who obtained this consent, to urge that the condition limiting it to a carriage of passengers is unreasonable."

St. Louis & M. R. R. Co. vs. City of Kirkwood, 60 S. W. 110.

See also

Columbus Railway, Power & Light Co. vs. City of Columbus, 249 U. S. 399.

"Telephone company which accepts conditions of an ordinance as to rates to be charged by a municipal corporation as a condition to the use of its streets or conduits cannot complain if the rates are not reasonable."

Simons Sons vs. Tel. & Tel. Co., 99 Md. 142 (4), 57 Atl. 193 (4).

See also

Pond vs. New Rochelle Water Co., 183 N. Y. 330, 76 N. E. 211.

In the case of Farnsworth vs. Boro Oil & Gas Co., 109 N. E. 860, the court said in head note (6):

"The inhabitants of a town might enforce a valid contract by a gas company with the town relative to the amount to be charged for gas, and it was immaterial whether the contract was valid by force of an estoppel, or for some other reason."

(Page 861.) "I think the defendant is estopped to deny the binding force of its agreement. It applied to the town board for permission to lay its pipes in the highways of the town, and it received the permission for which it prayed. The privilege may be one that the board was not competent to grant, but at least it believed itself competent, and the defendant shared that belief. There was a claim of right which the defendant extinguished for a price. The board asserted the power to regulate the use of the highway and to prevent the defendant's entry. The defendant yielded to the claim and purchased the coveted consent. It received the very benefit which it sought, the opportunity to lay its mains without molestation of its possession or question of its right. It did not intend to occupy a street as a trespasser. It intended to occupy them under color of the right which the consent of the board conferred. Under color of

that right it went into possession, and it has retained that possession, undisturbed and unchallenged, for nearly 14 years.

(Page 862.) "In such circumstances, the defendant will not be heard to say, while retaining possession of the highway, that the consent under which it entered was valueless and void. Its position is the same as that of a lessee who has gone into possession in submission to the title of the lessor. It is the same as that of a licensee who has acquired the right to manufacture under an outstanding, though defective, patent. The lessee will not be heard to say that the lessor had no title to convey."

See also

City of Louisville vs. Cumberland Telephone & Telegraph Co., 224 U. S. 648 (4), 56 L. Ed. 934 (4).

IX.

NO ACT OF THE RAILROAD COMMISSION CAN RENDER INVALID A VALID AND SUBSISTING CONTRACT OVER WHICH IT HAS NO JURISDICTION.

(a) The Railroad Commission is simply an agent of the General Assembly of Georgia, a creature of the General Assembly.

The Commission cannot do indirectly what it cannot do directly.

It has no jurisdiction over rates on the North Decatur line from Atlanta to Decatur.

The General Assembly by the proviso in the Act of 1907 has expressly preserved this contract and similar contracts.

By its refusal since then, (see the refusal to touch these contracts in the legislation on the Lawrence bill—Transcript p. 26) to repeal this proviso, the Legislature evidences the public policy of the State to preserve these contracts to the cities and towns which have had the wisdom and forethought to make them, and

which have given consideration therefor in the way of franchises and other privileges.

To say, therefore, that an agent of the General Assembly can nullify this contract indirectly by its rate-fixing power on other lines would be to say that the agent can do what the principal has said shall not be done, would be to say that the creature is greater than the creator. It needs no further argument and no citation of authorities. It seems to us to say that no defense is set up in Section 43 of the cross bill, viz., that the Act of the Railroad Commission in fixing a rate of seven cents on other lines automatically suspends and sets aside the contract provision fixing a maximum rate as an addition to the franchises and other rights granted in said contract with the Town of Decatur. (See Section 43 of cross bill—Transcript p. 230.)

Furthermore, all allegations as to what the Railroad Commission may have done or said as to the rates of fare on said North Decatur line, are irrelevant and immaterial, are entirely gratuitous remarks of the Commission in a matter over which they had no jurisdiction and no authority. Why these remarks were made we do not know. They doubtless have had the effect to encourage defendant companies to attempt to repudiate its solemn contract. If so, it has involved the Town of Decatur in a law suit to maintain its right under a solemn contract. Thus the Town of Decatur has been done an injury and an injustice in a matter over which the Supreme Court of Georgia has said the Commission had no jurisdiction. If the Commission had gone into a hearing of the matter and had considered that the five-cent rate in this contract of 1903 extended over a period of 18 years, and had considered the value of the grants given by the Town of Decatur to the Company, the conclusion would have been inevitable that the Town of Decatur was entitled to the rate fixed by its contract, and that the rate was fairly compensatory and reasonable under all the circumstances. At any rate, the declaration in a matter not before them, over which they had no jurisdiction, is not binding on the Town of Decatur, is irrelevant, and should not have been considered by the trial court, doubtless was not considered in passing on this case, and should not be considered by this Court.

There has been no legislative action to terminate this contract, neither is the contract forbidden by Constitution or statute law of Georgia. To the contrary, the Legislative policy has been to preserve these contracts. As indicative of that we call atention to an Act of General Assembly of Georgia approved Aug. 16, 1921 (Georgia Acts, 1921, page 111) which was an Act touching the incorporation and powers of interurban railroads operated by gas or electricity and the jurisdiction of the Railroad Commission over same, in which (Sec. 1, 2597 (E) the following language is used:

> "Provided, however, that nothing herein shall be construed to impair any valid, subsisting contract now in existence between any municipality and any railroad company or any street or interurban railroad or railway company, and provided this Act shall not operate as a repeal of any existing municipal ordinance. And the Railroad Commission shall not have the power and authority under this Act to increase the fares on the lines of such companies which have heretofore been fixed by contract between such companies and any municipality."

This repetition of the proviso in the Act of 1907 with the added language as above stated, indicates the determined public policy of the State that these contracts shall not be interfered with.

X.

ACT OF 1907 AND THE PROVISO THEREIN (CIVIL CODE, SECTION 2662) ARE NOT UNCONSTITUTIONAL AND VOID.

(a) It is asserted that the order of the Commission fixing a seven-cent rate on other lines and ordering an increase of service is confiscatory, and violates the Constitution of the United States and the Constitution of Georgia, (Sections 6358 and 6359). See Section 52 of cross bill—Transcript p. 235), and, therefore, that the Act of 1907 is unconstitutional.

Exactly by what process of reasoning this is arrived at we cannot see. How an Act of the Railroad Commission in fixing rates on lines of defendant companies could render unconstitutional an Act of the General Assembly we are unable to perceive.

The reasoning applied in the preceding subdivision is a complete reply to this contention, if, in fact, it needs any reply.

It is further asserted that the proviso of 1907 is unconstitutional and void, and violates certain sections of the Constitution of the United States and the Consitution of Georgia. (See Section 53 of cross bill—Transcript p. 236). It is claimed no legal distinction and separate classification is made between contracts made prior to 1907 and those made subsequent thereto, and that for other reasons said proviso is unconstitutional and void.

We call attention to the recent case of

Arkansas Natural Gas Co. vs. Arkansas R. R. Com. et al. decided by this Court March 19, 1923 (No. 500 Oct. Term, 1922,

in which that Court said:

"While a State *may* exercise its legislative power to regulate public utilities and fix rates, notwithstanding the effect may be to modify or abrogate private contracts, there is quite clearly no principle *which imposes an obligation to do so,* merely to relieve a contracting party from the burdens of an improvident undertaking."

The power conferred by the Legislature on the Railroad Commission in this case excepted from its jurisdiction the "power to modify or impair any existing contracts for supplying gas to persons, firms, corporatons, municipalities, etc." and this Court held the classification to be legal.

See also

Springfield Gas Co. vs. Springfield, Advance sheets 66 L. Ed. 38.

Crescent Cotton Oil Co. vs. Mississippi, Advance sheets 66 L. Ed., 55.

There is no merit in the attack sought to be made upon the Act of August 23, 1907.

The constitutionality of the Act must be determined as of the date of its passage. The Legislature is supreme in the matter of

rates. It is part of its police power. It may or may not exercise this power. It chose not to exercise it or to give it to its agent, the Commissoin, in cases covered by the proviso of 1907.

The classification is reasonable and right, in that it preserves only valid and subsisting contracts made prior to the Act of 1907. In that way, it draws a distinction between contracts made before and contracts made after the Act of 1907.

Classification as to contracts with towns and cities is also a reasonable classification and distinction. The Legislature doubtless had in mind that contracts made with towns and cities would be for the public good and that the public generally would get the benefit of those contracts. That is no doubt the reason it did not include in this proviso contracts made with private parties. This classification was reasonable and right and valid.

Furthermore, in the mandamus case, the Power Company attacked the Act of 1907 as unconstitutional and void. The Court in said mandamus case necessarily decided against this contention in finding that this contract was covered by the proviso in the Act of August 23, 1907, and that because of this Act, the Commission had no jurisdiction over this contract. Hence, the attack on the constitutionality of the Act of 1907 and the proviso therein, (See Sections 52 and 53 of cross bill—Transcript pp. 235-236), has been decided by the judgment in said mandamus case adversely to the contention of the defendants in this case.

Furthermore, the defnedants could take no comfort if the Act of 1907 were void. If that is unconstitutional and void, in what position does it leave defendant companies? It leaves the Railroad Commission without jurisdiction over street railroads if that Act is unconstitutional. It makes all acts of the Railroad Commission attempting to fix rates over street railway lines absolutely void. The seven-cent rate fixed by the Commission over other lines of defendant companies is void and has no effect. Where does this contention leave the Town of Decatur and defendant companies? It leaves them with a contract fixing the maximum rate at five cents, and all questions raised in this suit discriminatory and otherwise absolutely eliminated.

Further, as to the alleged order of the Commission for an increase of service (See Sections 51 and 52 of cross bill—Transcript p. 235), what has heretofore been said will also apply to that contention, viz.: that if the rate fixed in consideration of the entire body of rates and the increase of service ordered was not adequate, the Power Company had its remedy by appealing to the Courts to review the ruling of the Commission. Failing to do this, it is concluded on this question, and this Court must presume that the rates fixed were fairly compensatory when the entire body of rates on its entire system and the service required thereon were considered.

The trial court had no jurisdiction of this question as a primary proposition. It can only act as a court of review.

See authorities heretofore cited in this brief.

The remedy of defendant, if it is dissatisfied with the ruling of the Commission, is to again apply to the Commission for relief, and if dissatisfied with the ruling of the Commission, it can review that ruling in the courts.

It may be stated in this connection that the assertion in the cross bill that the Town of Decatur made application to the Commission for an increase of service is not a fact. The affidavit of Mr. Steele, Mayor of the Town of Decatur, in this regard, shows that the Town of Decatur has never made application to the Commission for an increase of service on the main or North Decatur line. (Transcript p. 28.)

XI.

DEFENDANT COMPANIES ARE ESTOPPED FROM PLEADING LACK OF AUTHORITY ON THEIR PART TO MAKE CONTRACT OF 1903.

(a) It does not lie in the mouth of defendant companies who have received the benefits of this contract to question its validity. Hence, the defendants are estopped from setting up the defense attempted to be set up in Section 42 of th croses bill (Transcript p. 230), even if there were any merit in those contentions. It is

there asserted that said contract of 1903 fixing rates was ultra vires the power of the Electric Company to enter into same; that it cannot enter into any contract against public policy; that said contract is violative of Section 6467 of the Constitution of Georgia against giving a rebate or bonus, and also of Section 6463, prohibiting unjust discrimination. As a matter of fact, this contract is not violative of ether Constitutional provision. Ths subject wll be treated later.

It is sufficient at this time to say that defendants cannot raise this question.

In the case of City of Belfast vs. Belfast Water Company, 115 Me. 234, 98 Atl. 738, the Court says:

1. "If a corporation expressly or impliedly adopts the contract made by its promoters and obtains its benefits, it must also take the obligations and burdens."

2. "When a party has accepted the benefits of a contract, not contra bonos mores, he is estopped to question its validity."

3. "Although the ultra vires contract of a municipality is a legal wrong, its illegality can be set up only by the person who suffers thereby, and not by one who obtains the benefits of such contract."

4. "Where a water company adopts a contract of its promoters to furnish water to the city and performed it for 30 years and then claiming that it was illegal, threatened to cut off the public supply, the city could by injunction restrain the cutting off of the water."

See the following cases cited as supported (2):

2. "It has been repeatedly held, and we think with good reason, that when a party has accepted the benefits of a contract, not contra bonos mores, he should not be permitted to question the validity of it; that he is estopped. Ft. Worth City Co. vs. Smith Bridge Co., 151 U. S. 294, 14 Sup. Ct. 339, 38 L. Ed. 167; Richardson vs. Welch, 47 Mich. 309, 11 N. W. 172; Doane vs. Lake Street, etc., R. R. Co., 165 Ill. 510, 46 N. E. 520, 36 L. R.

A. 97, 56 Am. St. Rep. 265; Collins vs. Cobe, 202 Ill. 469, 66 N. E. 1079; State vs. Germania Bank, 90 Minn. 150, 95 N. W. 1116; Gibbs vs. Craig, 58 N. J. Law 661, 33 Atl. 1052; Flower vs. Barnekoff, 20 Or. 132, 25 Pac. 370, 11 L. R. A. 149; Dyer vs. Walker, 40 Pa. 157.

2. "Parsons on Contracts, 961. And in Joy vs. St. Louis, 138, U. S. 1, 11 Sup. Ct. 243, 34 L. Ed. 834, where a railroad company was in the enjoyment of a right of way through a park, and had received the benefit of a large sum of money expended by park commissioners, under an agreement with them, the Court said that, without offering to return the property obtained by virtue of the agreement, it could not be heard to allege that the agreement was against the policy of the law."

See also

People's vs. Suburban Railway Co., 49 L. R. A. 650 (3).

XII.

THAT THE CONSTRUCTION PLACED UPON THE CONTRACT OF 1903 BY THE SUPREME COURT OF GEORGIA MAKES SAID CONTRACT APPLY TO TERRITORY SUBSEQUENTLY INCORPORATED IN THE TOWN OF DECATUR DOES NOT IMPAIR THE OBLIGATION OF THE CONTRACT.

This identical question has been decided adversely to the contention of plaintiffs in error. See the following cases:

Peterson vs. Tacoma Railway & Power Co., 140 Am. St. R., 936(4);

Illinois Cent. R. R. Co. vs. City of Chicago, 176 U. S., 646, 44 L. Ed., 622;

People vs. Detroit United Railway, 139 A. S. R., 582;

Almand vs. Atlanta Consolidated St. Ry. Co., 108 Ga., 417;

Not only have contracts of the kind here involved been repeatedly applied by the Courts to territory subsequently added to a

city, but it has frequently been held that a municipality may fix a rate of fare effective beyond its limits.

Public Service Commission vs. Westchester St. Ry. Co., 99 N. E. 536-538.

See also

Interurban Ry. & Ter. Co., et al. vs. Cincinnati, 93 Ohio St. 108; 112 N. E. 186.

Railway Company contended village was without authority to contract for fares beyond the municipal limits.

City of Detroit vs. Detroit United Railway, 139 N. W. 56 (1) (3); 165 Mich. 28, 150 N. W. 358;

Rice vs. Detroit Ry. Co., 81 N. W. 927;

People vs. Barnard Comptroller, 110 N. Y. 548, 18 N. E. 354;

Vining vs. Detroit Ry. Co., 95 N. W. 542;

Adams vs. Union R. R. Co., 42 Atl. 515;

Kissane vs. Detroit Ry. Co., 79 N. W. 1104;

Manitowoc vs. Manitowoc, etc., Traction Co., 129 N. W. 925;

St. Louis, etc., R. R. Co. vs. City of Kirkwood, 60 S. W. 110.

The following cases hold that under a contract similar to the contract of 1903, it is the duty of the street car company to preserve the contract rate for passengers not only from one town to the other, but also as to passengers boarding the car or cars at points intermediate to the towns.

Rice vs. Detroit, etc., Ry. Co., 48 L. R. A. 84;

City of Raleigh vs. Carolina Power Co., 104 S. E. 462.

XIII.

CONSTRUCTION OF CONTRACT.

It is a far-fetched contention that a five-cent rate under this contract of 1903 only applied from one point in Decatur, to-wit, Ansley's Drug Store, to the terminus in the City of Atlanta, and that passengers who got on at other points must pay 7c. It is also a far-fetched contention that the provision for the grant of transfers upon the payment of one full fare means the payment of a fare of 7c.

The admitted facts in the case show that for a period of 18 years, that is, from April 1, 1903, up to the present time, defendant companies have charged and collected a five-cent fare upon said North Decatur line from all points in the Town of Decatur to the City of Atlanta, and all points upon defendant's lines, and vice versa, from the City of Atlanta and all points on defendant company's lines to all points within the Town of Decatur from all passengers who take passage on said Decatur line, and that said companies have also given during said period transfers when requested upon the payment of a five-cent fare; that the foregoing has been the universal practice and custom of defendants since April 1, 1903. Facts further show that the loop on the present main or North Decatur line as referred to in contract of April 1, 1903, begins at the intersection of McDonough and Howard Streets, in the Town of Decatur, and extends through the Town of Decatur and returns to the same point at the intersection of Howard Avenue and McDonough Street, and that the point referred to in paragraph 34 of defendant's cross bill as the terminus of said North Decatur line is on said loop, and not a terminus at all. (See affidavit of Mr. J. Howell Green, Transcript page 27.) See also paragraphs 1, 2 and 3 of amendment. (Transcript pages 69 and 70.)

The contract itself by its very terms also shows that the construction as above stated, which the parties themselves have always placed upon it, is the construction which was intended by the parties to the contract. The granting of a transfer ticket as provided in the contract is for the purpose of giving one continuous ride from any point within the Town of Decatur upon

said Rapid Transit line to any point within the City of Atlanta on any of its lines in said city, or vice versa, etc. (See third paragraph of Section 2 of the Ordinance, Transcript page 57.) As will clearly be seen by an examination of the contract, it was the intention of the parties that the five-cent fare should cover transportation of passengers from any point in the Town of Decatur to the City of Atlanta on any of its lines in said city, or vice versa, and we also insist that the contract further covers fares from and to intermediate points between the Town of Decatur and the City of Atlanta.

It will clearly be seen from an examination of the contract also that one full fare means one full fare at the time the contract was made; that is, a fare of five cents. This isthe construction that the parties themselves have continually placed upon the contract. The general rules of construction of contracts under the laws of Georgia can well be applied to this case, (1) That the intention of the parties to the contract should govern; (2) That it should be construed more strongly against the party undertaking the obligation; (3) That it should be construed in the sense put upon it by the parties at the time it was made and subsequently to that time; (4) That the substantial purpose of the contract will control.

The construction put on the contract by defendant companies for 18 years should control.

Rice vs. Detroit, 81 N. W. 927; 130 N. W. 358.

A public contract should be construed liberally in favor of the public.

Muncie Natural Gas Company vs. City of Muncie, 160 Ind. 97 (7); 60 L. R. A. 822 (7).

In cases of doubt, contract construed in favor of City.

St. Helena vs. San Francisco, etc., Ry., 24 Cal. App. 71; 140 Pac. 600;

Contract construed strictly against Railway Company.

West Bloomfield vs. Detroit United Ry. Co., 109 N. W. 258; People vs. Detroit United Ry., 127 N. W. 748.

XIV.

DEFENDANT COMPANIES HAVE NO POWER TO SURRENDER THEIR FRANCHISE UNLESS ACCEPTED BY THE TOWN OR STATE.

White, Receiver vs. Davis, Receiver, 134 Ga., 274;

Harris vs. Muskingum Mfg. Co., 29 Am. D., 374;

7 R. C. L., 705 (709);

2 Kent, 310.

State and City of Bridgton vs. Bridgton & Millville Traction Co., 45 L. R. A. 837 (1) and (2), 33 Atl. 704;

Columbus Ry, etc., Co. vs. Columbus, 249 U. S. 399;

Public Service Com. vs. Westchester Ry. Co., 99 N. E. 536.

XV.

DEFENDANTS ESTOPPED BY JUDGMENT IN MANDAMUS CASE. (CIVIL CODE, SECTION 4335.)

The determination of the questions raised in the mandamus case, whether the Railroad Commission had jurisdiction over the rates of fares on the lines therein named, operated by the Power Company under lease from the Electric Company, was a public question in which the public was interested. All members of the interested public were represented in that suit. The Commission, as a public body, an agency of the State, represents the public. And all members of the public are concluded by that judgment. If this were not so, then any interested person, natural, or artificial, might bring this suit over and have the trial Court and the Supreme Court try the same matter again and again. The Court would stultify itself to hold that this could be done.

In the case of San Diego Land & Town Co. vs. Jasper, et al., 110 Fed. 702, 712, the Court said:

"Every person to whom the rates fixed apply—in other words, the public—is interested in the question, and the rep-

resentative of this public in the matter is the board of supervisors, each member of whom was made a party defendant to the suit, and all of whom appeared to the bill and interposed a defense in behalf of all the parties interested."

See also

23 Cyc, page 1269.

Hence, the intervenors, being members of the public, were represented by the members of the Commission, and are concluded by the judgment in the mandamus case. For another reason, the intervenors are concluded by the judgment in that case, vix., that they take the case as they find it. Tfiis will be discussed later.

An analogous case is that of validation of bonds, where it is held that all citizens and taxpayers, though not actual parties in the suit, are bound by the judgment of validation. They are represented by the State through the Solicitor General.

Thomas vs. City of Blakely, et al., 144 Ga. 488.

Union Dry Goods Co. vs. Georgia Public Service Corp., 145 Ga. 658.

"An order of the Railroad Commission, fixing a schedule of rates to be charged by public-service companies in a given municipality, is not invalid solely because a contract-holder of one of the public-service companies was not made a party and notified of the proceedings before the Commission."

San Francisco Gas & Electric Co. vs. City of San Francisco, et al. 164 Fed. 884, 887, and cases cited, pages 887 and 888;

Railway Company vs. Minnesota, 134 U. S. 418.

The Town of Decatur was concluded by that judgment. It was served with notice of the application filed with the Commission by the Power Company, asking for an increase in rates, and appeared by counsel in opposition to the application before the Commission. Though not an actual party in the mandamus suit, it

was represented in that suit by the Commission, and, therefore, was concluded by the judgment of that case. If the decision had been adverse to Decatur, as it was to Atlanta, the Town of Decatur would have been concluded just as Atlanta now is concluded, and we hardly suppose counsel for the Power Company would insist that Atlanta is not concluded by the judgment in the mandamus case, because it was not a party in that suit.

> "Although one is not nominally or formally a party to an action, he will be concluded by the judgment therein if he was represented, as to his rights or interests in the subject matter, by a party legally entitled to represent him, or who actually conducted the prosecution or defense on the behalf and for the benefit of such person."
>
> **23 Cyc. 1245.**

In the case of Snow Steam Pump Works vs. Homer, 155 S. W. 405, 410 (6), (7) and (8), the Court said:

> "These relators are estopped by the judgment in the mandamus case."

See the discussion of the Court in this case.

Plaintiffs in error, concluded as to all issues, which were issues in the mandamus suit, 149 Ga., and as to all matters or questions, State and Federal, which might have been put in issue in that suit.

That case, in which the Ga. Ry. & Power Co. was the plaintiff, directly involved the validity of this identical contract of 1903 with the Town of Decatur, and the plaintiff attacked the validity of this agreement of 1903 with the Town of Decatur upon a number of grounds, some of them constitutional (Transcript of record, page 89).

The petition of the Power Company in the mandamus case is shown in Transcript of record, pages 76 to 91.

The Supreme Court of Georgia in that case held this identical contract to be a valid and subsisting contract. The Power Com-

pany in that case could have raised the Federal questions now attempted, but did not do so and did not except to that decision to this Court. It is, therefore, concluded by that decision, in other words it is readjudicata.

If, however, this Court should hold that the decision of the Supreme Court of Georgia in the mandamus case, does not conclude the plaintiffs in error on the Federal questions which might have been raised as res adjudicata, then we insist that that decision of the Georgia Supreme Court of Georgia holding this agreement of 1903 to be a valid and subsisting contract is conclusively binding on this Court.

XVI.

THE ELECTRIC COMPANY IS IN PRIVITY WITH THE POWER COMPANY, AND IS CONCLUDED BY THE JUDGMENT AGAINST THE POWER COMPANY IN THE MANDAMUS SUIT.

Persons in privity with actual party in suit are bound by the judgment.

23 Cyc., page 1253.

Is the Electric Company in privity with the Power Company as to the litigation, or the subject matter of the suit in the mandamus case? We assert that it is.

The purpose of that suit was to force the Railroad Commission to take jurisdiction over the fixing of fares on lines of defendant companies, including the North Decatur line. The effect of that suit, if the Power Company had succeeded, would have been to strike down this contract of 1903 with the Electric Company, and release the Electric Company from its contract with the Town of Decatur. The Electric Company would have benefited by that litigation if the Power Company had succeeded. The Power Company was, therefore, litigating for the Electric Company, as well as for itself. Their interests were mutual, and where interests of parties are mutual, they are in privity.

"Where the interests of parties are mutual, although the suit is in the name of one, both are represented, and both are estopped to deny any of the issues adjudicated in any suit jointly or singly on one side and the same defendant on the other side."

Carmody vs. Hanick, 85 Mo. App. 659.

The mutuality of interests of the Power Company and the Electric Company in the subject matter of litigation in the mandamus case, to-wit, the effort of the Company to force the Commission to take jurisdiction and thus break the contract of 1903 with Decatur, is shown by the record in the mandamus case. See the exhibits thereto attached as an exhibit in that case. (Transcript, pages 160 to 163.) It appears that one item which the Power Company paid in 1917 out of its total net income (less taxes) of $2,975,983.00, was an annual contract rental for leased properties of the Electric Company of $1,605,572.00, which was something over 50 per cent of its net income above named. The Power Company gets all of the revenue earned by the Electric Company and in turn pays all the expenses, interests, taxes and other fixed charges, and in addition, pays to the stockholders of the Electric Company in annual dividends 5 per cent on their preferred stock, and 8 per cent on their common stock. Hence, it is evident that an increase is asked of the Commission, and the Commission is asked to take jurisdiction for the purpose of enabling the Power Company to meet these fixed charges in favor of the Electric Company for the use of its properties, and these fixed charges for the year 1917 are shown to be over 50 per cent of its net income.

As further showing their mutuality of interest, when this notice was served attempting to terminate this contract, it was served jointly by the Power Company and the Electric Company. (Transcript, page 58.) They are acting together in attempting to abrogate this contract, acting in concert. The same counsel represents them. They are Siamese Twins. If they have two hearts, they beat as one; they are united in the unholy bond of attempting to break a solemn contract made by one and assumed by the other.

Further, whatever interest the Electric Company has now, since its assignment of interest to the Power Company, is under or through the Power Company. It is the obligee of the Power Company. Its interest in the mandamus litigation was as obligee of the Power Company. Unless it is thus interested, then it has no interest in this suit and no standing in Court, except as a nominal party or as a volunteer.

Its claim of interest is that the Power Company owes it certain things to pay the fixed charges above referred to and to perform its contractual obligations. That makes its claim of interest under or through the Power Company, and since it claims whatever interest it now has under or through the Power Company, it is in privity with the Power Company as to subject matter in the mandamus litigation.

Where a person claims under or through another party it is in privity with that party.

23 Cyc. 1253-1254;

Mehlhop vs. Ellsworth, 64 N. W. 638.

Persons in privity with actual party bound by judgment.

23 Cyc 1249-1253;

Emery vs. Fowler, 39 Me. 326;

Godding vs. Live Stock Co., 34 Pac. 942;

In Re: Baird 24 Pac. 167 and 49 Texas 243.

Persons in privity bound by judgment, though not parties in former suit.

Smith vs. Hornsby, et al., 70 Ga. 552.

XVII.

PLAINTIFFS IN ERROR CONCLUDED AS TO ALL ISSUES WHICH WERE ISSUES IN THE MANDAMUS SUIT OR AS TO ALL MATTERS WHICH MIGHT HAVE BEEN PUT IN ISSUE IN THAT SUIT.

(CIVIL CODE OF GEORGIA 4336)

"A decree in equity is conclusive of all defenses available to defendant, whether or not they were presented and litigated."

23 Cyc. 1200.

"Judgment negatives every defense, objection or exception which might or should have been raised."

23 Cyc. 1197.

See the following cases:

Gunn vs. James, 120 Ga. 482 (3);

Greene vs. Ry. Co., 112 Ga., 859;

Conwell vs. Neal, 118 Ga. 624;

Perry vs. McLendon, 62 Ga. 598.

The attack in this case is exactly the same as in the mandamus case, viz., that the contract of 1903 is invalid or void, and that the Act of 1907 or the proviso therein is unconstitutional and void. It is true that additional reasons are now assigned why the contract of 1903 is unenforceable and additional reasons given why the Act of 1907 or the proviso therein is unconstitutional and void. We insist that if these issues were not pleaded or raised in the mandamus case, that they could have been pleaded in that suit and that defendants are concluded by that judgment as to all issues which they might have made in that suit.

XVIII.

ARTICLE 4, SECTION 2, PARAGRAPH 1, OF THE CONSTITUTION (SEE SECTION 6463 PARK'S CODE), IS NOT SELF-EXECUTING AND DOES NOT STRIKE DOWN THE CONTRACT OF 1903.

It is contended by counsel for plaintiffs in error that the section of the Constitution above referred to is self-executing, and that since the rate on all lines of plaintiffs in error, except the main Decatur line and College Park line, has been advanced from five cents to seven cents by order of the Railroad Commission, the maximum rate on the main Decatur line under the contract of 1903 being fixed at five cents, said contract of 1903, on account of this difference in rates, has become discriminatory and is abrogated by the above constitutional provision. The test as to whether a constitutional provision is self-executing is well stated in the following language of the Court in the case of Woolworth vs. Bowles, 61 Kansas 569, 574, to-wit:

> "As a rule, constitutional provisions, unless expressed in negative form or possessed of a negative meaning, are not self-assertive. They usually assume the form of a command to the Legislature, and the legislative action becomes necessary to give them effect."

This case is cited and followed in Rowland vs. Forest Park Company, 79 Kansas 134. The same doctrine is clearly announced in Groves vs. Slaughter, 15 Peters 449, 10 L. Ed. 800.

Here the Court passes upon the Constitution of Mississippi, which declared "that the introduction of slaves into that State, as merchandise, or for sale, shall be prohibited from and after the first day of May, 1833." This language of the Constitution would seem to be prohibitory, but the Supreme Court of the United States says not, stating that "the language of the Constitution obviously points to something more to be done and looks to some future time, not only for its fulfillment, but for the means by which it was to be accomplished." The Court says further, "there are no penalties or sanction provided in the Constitution for its due and effectual operation."

In the case of Fusz vs. Spaunhorst, 67 Mo. 256, the constitutional provision which made it criminal for officers of a banking institution to accept deposits after knowledge that the institution was insolvent, and further making such officers civilly liable for any loss sustained by such an act, although the word "shall" is used both in reference to criminal offense and civil liability, it was held upon a civil suit that this provision in the constitution was not self-executing, the Court saying:

> "The cases are exceptional where constitutional provisions enforce themselves; ordinarily the labors of the Convention have to be supplemented by legislation before becoming operative."

In the case of State vs. Mayor of Helliner, 85 Pac. 744, the Court holds the constitutional provision there reviewed not self-executing, and says further:

> "If the Legislature fails or refuses to enact any measure on the subject at all, then the right granted would simply lie dormant, for it must be conceded that there is no power which can coerce the Legislature into enacting a particular law."

This same rule is announced in Groves vs. Slaughter, supra. Se all the following cases:

> **St. Louis A. T. R. Co. vs. Fire Association, 30 S. W. 350, 352;**
>
> **Bowie vs. Lot, 24 L. A. Ann. 215;**
>
> **State vs. Cole, auditor, 32 So. 314.**

The general rule stated above seems to be clearly supported by the authorities cited. Testing the constitutional provision contained in 6463 of the Code by this rule, it seems to us that the concluiosn must inevitably be reached that this provision of the Constitution is not self-excuting. Note the language:

> "The power and authority of regulating railroad freights and passenger tariffs, preventing unjust discriminations, and requiring reasonable and just rates of freight and passenger tariffs, are hereby conferred upon the General Assembly."

Where is the authority to do these things vested? Clearly in the Legislature, for the constitution says it is conferred upon the General Assembly (Georgia Code, Sec. 6464). Here is a plan addressed to the General Assembly calling upon it to do certain things. The section referred to then proceeds as follows—referring to the General Assembly:

> "Whose duty it shall be to pass laws, from time to time, to regulate freight and passenger tariffs, to prohibit unjust discrimination on the various railroads of this State, and to prohibit said railroads from charging other than just and reasonable rates and enforce the same by adequate penalties."

The Constitution does not undertake to provide how all these things shall be done, but plainly and unmistakably calls upon the Legislature to do so and to provide for adequate penalties to enforce the statute or statutes to be enacted by the Legislature.

The Legislature undertook to carry out the provisions of this section of the Constitution when it enacted the law of 1879, creating the Railroad Commission, and doubtless thought no further legislation was necessary under this constitutional provision at that time. Since then, by the act of 1907, the Legislature has seen fit to extend the authority of the Railroad Commission over street railroads and telephone and telegraph companies, and doubtless from time to time, as they deem it advisable, and necessary, the powers of the Commission will be extended to include still other public utilities. But we shall contend and undertake to show later that this extension of power by the Railroad Commission is not under and by virtue of this constitutional provision, but by virtue of the power already vested in the Legislature under the common law which gave the Legislature full and ample power to do all that it has done without this constitutional provision. So, we submit that the section of the Constituion referred to is not self-executing, and that the contract of 1903 was not destroyed by this constitutional provision whether discriminatory or not and the proviso in the Act of August 23, 1907, by which the contract of 1903 between the Town of Decatur and defendants was preserved, was a valid legislative enactment, and that said contract was then and now is still valid and binding.

XIX.

ARTICLE 4, SECTION 2, PARAGRAPH 1, OF THE CONSTITUTION, WHETHER SELF-EXECUTING OF NOT, DOES NOT APPLY TO STREET RAILROADS.

We submit that the language of this section of the Constitution clearly shows that the constitutional convention did not have in mind street railroads at all, but were considering merely steam railroads. Notice the language of the section referred to:

> "Railroad freights and passenger tariffs," "reasonable and just rates of freight and passenger tariffs," and again, "to regulate freight and passenger tariffs."

If the language of the section itself leaves any doubt that the constitutional convention was not considering street railroads at all, this doubt will be removed by reading the debates in the convention upon this section of the Constitution, as reported by Mr. Small in his notes on "Constitutional Convention of Georgia." See pages 378, 382, 383, 410, 465-466.

The Legislature evidently put this construction upon the provision of the Constitution referred to, for it expressly excepted street railroads from the act carrying into effect this constitutional provision. See Acts of 1878-9, page 130, Section XII.

We have examined the roster of the constitutional convention, and also the House and Senate Journal of the Legislature of 1878-9, and find that a number of the delegates to the convention were also members of this Legislature that passed the enabling act under the section of the Constitution referred to. In this connection, see the statement of Justice Simmons in the case of County vs. Thompson, 83 Ga., page 270, in that portion of the opinion found on 275, as follows:

> "This shows the construction placed upon these sections of the Constitution by the members of the Legislature from the adoption of the Constitution and the last session of that body; and we know of our own knowledge that there were

many able lawyers in the successive Legislatures, whose opinions on questions of this sort have great weight with us."

These men doubtless knew what was the intention of the convention in adopting this section of the Constitution, and the construction placed on this section by the Legislature only two years after the constitutional convention doubtless has great weight with this Court. See the following authorities:

County vs. Thompson, 83 Ga. 274;

Fullington vs. Williams, 98 Ga. 813;

Hawkinsville R. Co. vs. Waycross R. Co. 114 Ga. 243.

We, therefore, submit that the constitutional provision in question does not apply to street railroads, and that the action of the Legislature in exending he power of the Railroad Commission to include street railroads in the Act of August 23, 1907, is based upon its power under the common law.

XX.

IF ARTICLE 4, SECTION 2, PARAGRAPH 1, OF THE CONSTITUTION BE SELF-EXECUTING, AND IF IT APPLY TO STREET RAILROADS, IT IS ONLY DECLARATORY OF THE COMMON LAW, AND COMMON LAW PRINCIPLES MUST BE APPLIED IN DETERMINING WHETHER THE CONTRACT OF 1903 BE DISCRIMINATORY.

(We do not think the question of discrimination is involved in this case, as there is no interstate traffic, but inasmuch as plaintiffs in error contend that the question is involved, we submit the following on that subject.):

The Court will note that the section of the Constitution referred to directs the Legislature to prevent "unjust" discriminations and to require "reasonable and just" rates of freight and passenger tariffs, and says again that the Legislature shall pass laws to prohibit "unjust" discriminations and also to prohibit the roads from charging other than "just and reasonable" rates, etc.

From an examination of the authorities below cited, it will be seen that these are the exact terms used all through the common law when dealing with discriminations by carriers.

In the case of Bayles vs. Kansas Pacific Co., 5 L. R. A., page 480, the Court, after reviewing a numbe of authorities on the question of discrimination under the common law, says, at the bottom of page 483, the last column:

> "In the light of these authorities, attention is now called to the provisions of the Constitution which relate to this subject. Section 6 of Article 15 declares that 'all individuals, associations and corporations shall have equal right to have persons and property transported over any railroad in this State, and no undue or unreasonable discrimination shall be made in charges or in facilities for transportation of freight or passengers within the State; and no railroad company nor lessee, nor employee, thereof, shall give any preference to individuals, associations or corporations in furnishing cars or locomotive power.' "

The Court then holds that this provision of the Constitution is merely declaratory of the common law. See also the following cases:

> **McDuffie vs. The Portland & R. Railroad, 13 Am. R., 84 (II);**
>
> **Concord & Portsmouth Railroad vs. Forsaith, 47 Am. R. 181;**
>
> **State vs. Central Vermont R. R. Co., 130, Am. St. R., 1065, last head-note, 1071.**

In 10 C. J., page 473, it is said:

> "At common law, only an unjust discrimination by carriers is condemned. So the constitutional and statutory provisions of the State and Federal Governments prohibiting discrimination are very generally held to prohibit only unjust discriminations."

Again, in 4 R. C. L., 576 (44), it is said:

> "It has usually been considered that statutes or constitutional provisions prohibiting discrimination are merely declaratory of the common law and impose no greater obligations than the common law would have imposed without them."

Examination not only of this provision of the Constitution, but the acts of the Legislature, as embodied in the Act with reference to discrimination by carriers, discloses that it is the policy of the State to follow the common law in reference to discrimination by railroads and merely to avoid unfair rates, as is clearly shown by the provision in the Constitution which requires the Legislature to provide adequate penalties for unjust discrimination. If, then, we are correct in our position that this section of the Constitution is merely declaratory of the common law—and we submit that we are sustained in this position by the authorities, then we shall have to look to the common law to determine whether or not there is any unjust discrimination provided for under the terms of the contract of 1903.

XXI.

UNDER THE COMMON LAW, WHICH WE SUBMIT CONTROLS IN GEORGIA, THE CONTRACT OF 1903, BETWEEN THE TOWN OF DECATUR AND GEORGIA RAILWAY & ELECTRIC COMPANY IS NOT UNJUSTLY DISCRIMINATORY.

There are two lines of decision in the Courts of the United States as to what is the common law with reference to discrimination by carriers. Some courts hold that, under this law, it is the duty of carriers "receive and carry goods for all persons alike, and that the rates must not only be reasonable, but equal, when the conditions are substantially the same." Other courts hold that, under the common law, "the right of action was based upon the rate charged being unreasonable and excessive in itself, and that a mere discrimination gave no cause of action."

In the case of Cowden vs. Pacific Co., 18 L. R. A., 221 (2), 223, the Supreme Court of California considers two lines of decisions, and reaches the conclusion that the decisions of the American courts holding that equality is required under the common law was influenced by the decisions of the English courts interpreting the early English statutes modifying "the common law and that, therefore, this line of decisions is weakened to that extent." The Court then cites English cases, drawing a distinction between the common law of England and the equality statutes of England.

The leading case in the United States on this subject seems to be the case of Johnson vs. Pensacola & P. R. Co., 26 Am. R., 731, 16 Fla., 623. This case was decided in 1878 before any statute on the subject existed in Florida. After reviewing the English and American cases, the Court concludes that exact equality is not required, the true rule being stated by the Court on page 738, as follows:

> "The rule is not that all shall be charged equally, but reasonably, because the common law is for the reasonable charge and not the equal charge. A statement of inequality does not make a cause of action because it is not necessarily unreasonable."

In a later case (1890), Cleveland, etc., Railroad vs. Closser, 9 L. R. A., page 754, the Supreme Court of Indiana reviews the English and American cases and reaches the same conclusion as the Florida Court, and, on page 757, says:

> "The current of judicial opinion in America flows in the general channel marked out and opened by the Courts of England,"

citing many cases, and then proceeds to criticise cases holding adversely. See also ex parte Benson, 18 S. C., 38:

Pittsburg R. R. vs. Gage, et al., 12 Gray, 393, 398;

Spoffard vs. Boston R. R., 128 Mass., 326-8;

State vs. Central V. R. Co., 130 Am. St. R., 1065.

The Georgia cases support this position also. In Ocean Steamship Company vs. Savannah Supply Company, 131 Ga., 834, the Court quotes the Johnson case, supra, and others, stating the common law rule, and says:

> "In these cases the complaining shippers were accorded by the carriers every legal right which they could lawfully exact, and their complaint was, not that the carriers were remiss in any duty to them, but that they were entitled to share in the favors extended to the other shippers."

"In the case in hand, the complaint is that the carrier denies the plaintiff a substantial legal right; that the carrier owes it a duty to accept its lumber in the order of its tender and the carrier refuses to perform this duty and is prevented from performing it by giving a preference to shippers of cotton. The gist of the complaint is not so much that favors are shown to shippers as it is that the bestowal of these favors interferes with the steamship company in discharging its duty to the plaintiff by accepting its commodity in the order of its tender.

Again, in Merchants, etc., Co. vs. Granger, 132 Ga., 171, the Court says:

> "We aprehend the rule to be, as has often times been declared, that a carrier may grant favors to the shipper without being open to the charge of unjust discrimination only when the carrier, by granting the favor, does not deny to other shippers any right which they may demand under the law, and the favored shipper is not given any material advantage in competition in business."

In Wadley Southern Railway Company vs. State, 137 Ga., 509, the Court says:

> "At common law, carriers were allowed to discriminate in favor of some of their patrons so long as the bestowal of the favors did not violate their duty to the public,"

citing Ocean Steamship Company, supra.

XXII.

UNDER THE AUTHORITIES ABOVE CITED, THE CONTRACT OF 1903 BETWEEN THE TOWN OF DECATUR AND THE GEORGIA RAILWAY & ELECTRIC COMPANY DOES NOT CREATE AN UNJUST DISCRIMINATION.

It is well settled that every inequality does not create an unjust discrimination. While it is true that since the raise in rates upon all the lines of the defendant companies, except the College Park and main Decatur line, there is an apparent inequality between the five-cent rate on the main Decatur line and the seven-cent rate on other lines of the defendant companies, when the facts are considered, the inequality is only apparent and not real. We invite the Court's attention to the facts in connection with the contract of 1903, which are as follows: In the fall of 1902, there were three lines of street railway between Atlanta and Decatur, one on the south side of the Georgia Railroad, one immediately north of the Georgia Railroad. and one still farther north and practically parallel to this line. On the morning of December 29, 1902, the Electric Company, without notice to the town authorities of Decatur, commenced tearing up its track and structures on the most northerly line, in violation of law. This was stopped on the same day by an injunction secured by the town authorities. As the record shows (see recitals in contract of 1903) the officials of the Electric Company then commenced negotiations with the town authorities for an adjustment of the litigation, by which the Electric Company should be permitted to take up the line it had already started to tear up and abandon its operation. The negotiations finally resulted in the contract of 1903, which permitted the Electric Company to take up the line in question and abandon its operation, and one of the considerations for this permission was that the Electric Company and its successors should never charge more than five cents for one fare upon its main Decatur line, above referred to as the Rapid Transit line, etc. This contract was executed on the part of the Town of Decatur by the performance of all that it obligated itself to do, and the line of railway in question was taken up and the Electrict Company and its successor, the Power Company, have been saved the expense of maintaining and operating this line for about eighteen years and is now enjoying exemption from this

expense and proposes to continue to enjoy the same exemption. This, we submit, is a valuable and adequate consideration to support the contract. There is no suggestion anywhere in the evidence that this consideration is not either valuable or adequate, and we dare say if the Power Company and the Electric Company were given the choice of restoring the line and operating it and then collecting seven cents or allowing the status to remain as it is, they would indefinitely prefer to collect five cents on the main Decatur line and not restore and operate this old line that was taken up. This valuable consideration distinguishes this contract from most similar contracts and creates a condition much dissimilar and unlike any condition that exists on any other part of the system of the railways of the defendants, so far as the record shows. No fact appears to show that the consideration for this contract was not reasonable or adequate, and the burden is on the defendants to show undue advantage by this contract. The law will presume the contract was founded upon a sufficient consideration.

The Court's especial attention is called to the case of Forman vs. New Orleans & C. R. Co., 4 Sou. 246. In this case, the ordinances of the City of New Orleans provided that there should be a five-cent fare from Canal Street to Napoleon Avenue Station and a five-cent fare from Napoleon Avenue Station to Carrollton, making the through trip from Canal Street to Carrollton cost the passenger ten cents, but provided that residents living above Napoleon Avenue should have the privilege of purchasing through tickets at the rate of ten for fifty cents, thus giving the residents above Napoleon Avenue the privilege of riding from Carrollton to Canal Street and from Canal Street to Carrollton for five cents. This privilege was not accorded to the general public, but only to residents above Napoleon Avenue. This ordinance was attacked as creating an unjust discrimination, and was upheld by the Court, the Court stating that it was proper for the residents above Napoleon Avenue to have the privilege of riding to their business at the center of the City on Canal Street for five cents. In this connection, while it is not suggested in the decision, we wish to suggest to the Court that much is being said and written at the present time by writers on the development and progress of cities and towns as to the necessity of giving low fares from the center of the city to the suburbs, in order

to prevent the congestion of residences in the center of the city, thus encouraging people to move to the suburbs and promoting morality and health.

In the New Orleans case, the Constitution of the State of Louisiana gave the cities control of their streets, but there is no specific authority in the language of the Constitution authorizing the cities of the State to fix the fares of street railroads, and yet in this decision the Supreme Court of Louisiana holds that, under the power that the cities have over their streets, they have full power and authority to make ordinances and contracts tracts fixing the fares of street railroads.

In the contract between the defendants and the Town of Decatur, it will be observed that the general public has the same right to ride on the main Decatur line for a five-cent fare as have the citizens of the Town of Decatur, whereas in the New Orleans case only the residents living above Napoleon Avenue were awarded this privilege, and yet the contract was upheld by the Supreme Court of Louisiana as not creating unjust discrimination. In the case of Robira vs. New Orleans Co., 14 So., 214, the Forman case, supra, is cited and followed. The decisions abound with instances where inequalities exist, and yet they hold that no unjust discrimination is created. See the following cases:

Root vs. Long Island Railroad Co., 4 L. R. A., 331 (a case where a shipper was given a rebate regularly in consideration of his erecting a dock which was used jointly by the railroad and the shipper);

Hoover vs. Penn. Railroad Company, 22 L. R. A., 263 (a case where a manufacturer was given a special rate on a shipment of coal in consideration that it would route all of its manufactured goods over the line of the defendant railroad company);

Bayles vs. Kansas Pavific Railroad Co., 5 L. R. A., 480.

Especial attention is invited to this latter case, in which the first head-note is as follows:

> "Mere inequality between the rate charged a shipper by a railroad company for transporting goods and the company's published tariff rates is not prohibited either by the common law or by the provision in Section 6, Article 15 of the Constitution, that 'no undue or unreasonable discrimination shall be made in charges'; hence a contract to transport a certain shipper's goods at less than regular tariff rates is valid, unless it be shown that an unjust discrimination was thereby made or intended."

Interstate Commerce Commission vs. Baltimore & Ohio Railroad Co., 145 U. S., 263, 36 L. Ed. 699, 705 (which deals with a party-rate ticket and holds that giving a special rate for such a ticket is not a rebate);

Little Rock & M. R. Co. vs. St. Louis & S. R. Co., 26 L. R. A., 192 (which holds that a requirement that freight shall be prepaid by a connecting carrier, without requiring the same of other shippers, is not an unjust discrimination);

Gamble-Robinson Company vs. Chicago & N. R. Co., 21 L. R. A. (N.S.), 982 (which case is also on the question of prepayment of freight and holds that such a requirement is not an unjust discrimination, although the purpose of the requirement of the prepayment of the freight is to injure the business of a consignee or harrass it).

To the same effect, see the following cases:

Oregon Short Line vs. Northern P. R. Co., 61 Fed., 158;
Interstate Commerce Commission vs. Alabama M. R. Co., 168;

U. S., 144, 42 L. Ed. 414 (2), where the question of competition as justifying a different rate is dealt with.

See also:

10 C. J., 493 (b), where the same subject is dealth with.

Again, on the same point, see:

Lough vs. Outerbridge, 25 L. R. A., 674, where it is held that a special rate given to the shipper by the master of a vessel in port, while a rival vessel was in port loading, was not an unjust discrimination against other shippers who did not agree to give all of their tonnage to one vessel.

See also, on the question of competition:

Interstate Commerce Commission vs. Chicago G. W. R. Co., 209 U. S., 108 (5), 52 Law Ed., 705.

The exclusive business of a shipper is held to be a sufficient consideration to support a special rate in State vs. Central Vermont R. Co., 130 Am. St. R., 1065. See:

4 R. C. L., 583, 4, as to special rates for return and commutation tickets;

4 R. C. L., 600, spur tracks;
4 R. C. L., 601 (75), shipper providing cars;

Cleveland, Coulmbus & C. I. R. Co. vs. Closser, 9 L. R. A., 754, granting rebates;

Ex parte Benson, 44 Am. R., 564;
18 S. C., 38;

Concord & Portsmouth R. vs. Forsaith, 47 Am. St. R., 181, where lower rate is given for large quantity than for small quantity;

4 R. C. L., 579 (47), long and short haul clause;

Interstate Commerce Commission vs. Detroit, etc., R. Co., 167 U. S., 633, 42 L. Ed. 306, where it is held that furnishing free cartage on delivery of goods at one town but not at another, for which the same rates are charged for shorter haul is not equivalent to charging a greater

compensation for a shorter distance in violation of Section 4 of the Act to Regulate Commerce, etc.

In the case of Murphy vs. Worcester Consol. Street Railway Company, 199 Mass., 279, 85 N. E., 507, it is held that requiring a street railway company to carry schol children at a reduced rate is not unjust discrimination.

In 122 N. W., 1023, it is held that a telephone company may furnish free telephones to a city without being guilty of unjust discrimination.

XXIII.

THE CONTRACT OF 1903 IS NOT THEREFORE UNJUSTLY DISCRIMINATORY FOR THE FOLLOWING REASONS:

(a) At the time this contract was made, in 1903, the rate on all lines of defendant companies was five cents. There was no inequality of rate then. The rate on all lines in the year 1907, when the Act of August 23, 1907, was passed, was five cents. There was no inequality of rate at that time.

The common law prohibited only unjust discrimination. Our Constitutional provision, Code 6463, and our statutes are only declaratory of the common law.

The Courts, in passing upon the question, hold there is no "unjust" discrimination where the rate fixed by contract is founded upon an adequate or reasonable consideration. It is, for instance, not every advantage in a rate given to shippers which is condemned, but only the undue adavntage which injures the business of the shipper. See the authorities cited in this brief. The rule is stated in 4 R. C. L., 603, Sec. 74, as follows:

> "But the matter is, under the general rule of law, largely one of fact, and where it appears that the consideration given for a special preference or rebate is a bona fide contract, although allowing a discriminating rebate, cannot be determined to be, as a matter of law, invalid, for when the

consideration paid for reduced rates by a favored shipper is obviously equal to a discount allowed him, there is in fact no no discrimination and the contract is not obnoxious to the law."

Decatur gave consideration for this contract, as shown by the facts in the record, and, as already stated, the people who ride on other lines of the defendant companies get the benefit of this contract.

(b) All contracts must be construed as of the date when executed and under the circumstances existing at that time. It is not contended that this contract was discriminaory in 1903 when the contract was made, or on August 23, 1907. It is conceded that the rates on all lines up to these dates and up to the year 1919 was five cents.

What is an undue and unreasonable advantage is a question not of law but of fact. It is not shown by the defendant companies that the consideration for this contract was not reasonable or adequate. See:

Roote vs. Long Island R. Co., 4 L. R. A., 331;

Concord & Portsmouth R. Co. vs. Forsaith, last paragraph, 47 Am. R., 182; 130 Am. St. R., 1071;

10 C. J., 508;

Interstate Commerce Commission vs. Alabama & M. R. Co., 168 U. S., 144 (4);

Under the undisputed facts in this case there is a valuable and adequate consideration to support the contract.

In City of Superior vs. Douglas Co. Tel. Co., 141 Wis., 363, 122 N. W., 1023, the Court says:

"A contract binding a telephone company operating in a city to maintain telephones in the public offices in the city building and in public library building without cost to the city, entered into at a time there was no statute prohibiting

the company from granting the city a different rate for service han general customers, is not invalid because creating an unjust discrimination.

"In the absence of any statute on the subject, a public service corporation may make a different rate to one person than to another, or accept pay from one on a money rate and from another in service of a legitimate character, or some other reasonable equivalent, so long as the compensation demanded is within reason under the circumstances, for only unjust discriminations are condemned at common law.

"The validity of a contract, sanctioned by public policy when made, is not affected by a change in public policy by legislative act or otherwise.

"Public policy as bearing on the judicial enforceability of contracts is that principle which maintains that a person cannot rightfully do or bind himself to do that which is inimical to the public good, and hence a contractual situation not clearly within the principle condemning it cannot be said to be illegitimate merely because there is discrimnation.

"Discriminatory contracts between public utility corporations and their patrons which are void as inimical to the public good are void because unreasonable advantage is thereby given to one customer or a class over others, as all have a moral and legal right to equality of treatment.

"A contract between a public utility corporation and the State or a public corporation which gives the State or public corporation advantage over general customers inures to the benefit of the State or public corporation in the aggregate, and is not discriminatory, and is not violative of public policy.

"A contract binding a telephone company operating in a city to maintain, without charge, telephones in the public offices of the city, is not invalid as contrary to public policy, for the advantage is to the public."

(c) The five-cent rate given on the North Decatur line is a provision in favor of the general public and is not therefore an unjust discrimination and is not confined to the citizens of Decatur, and therefore is not an unjust discrimination, and is therefore not against public policy.

In City of Belfast vs. Belfast Water Company, 115 Me., 234, 98 Atl., 738, the Court says:

> "8. At common law, a contract to supply a city with water for a certain rental for the period of 20 years, and thereafter the supply to be free, is not illegal as a discrimination by a public utility; the permanent supply having been paid for in 20 installments instead of annually."

> "9. At common law, a contract for free supply of water to a municipality is not illegal as discriminating against other users, being a discrimination in favor of the city, and therefore discrimination in favor of the public and not contrary to public policy."

See also:

Banks vs. Matthews, 98 U. S., 629;

N. Y. Telephone Co. vs. Cooper, 69 N. E., 109;

Superior vs. Dayton County Tel. Co., 122 N. W., 1023;
Wilcox vs. Consolidated Gas Co., 212 U. S., 19, 29 Sup. Ct., 192, 53 L. Ed. 382, 48 L. R. A. (N. S.) 1134;

Interstate Commerce Commission vs. B. & O. R. R. Co., 145 U. S., 278, 12 Sup. Co. 844, 36 L. Ed. 699;

Waterworks Co. vs. School Dist. No. 7 of Kansas City (C. C.), 48 Fed. 523;

Dempsey vs. N. Y. Central, etc., Ry. Co., 146 N. Y., 290, 40 N. E. 867;

Wyman on Public Service Corp., Sec. 1304.

The general public gets the benefit of this rate. Any person no matter who he is, rich or poor, white or colored, no matter where he resides, if he travels over this line to Decatur from

Atlanta or vice versa, gets the benefit of this rate. It is not confined to the citizens of Decatur; it is for the public generally

(d) The Legislature is the final arbiter of what is sound public policy. The Legislature, by this proviso in the Act of August 23, 1907, has indicated that it is the public policy of the State to preserve to the public those contracts made by cities and towns wih street railroads fixing rates. The Legislature doubtless recognized the principle supported by the authorities already given that, where a contract is made with a municipality for the benefit of the general public, it stands upon a different basis from contracts with private individuals and is not, therefore, an unjust discrimination and not against public policy. Hence they did not include in this proviso in the Act of 1907 contracts made with private individuals.

This is the declared public policy of the State. It will not be presumed that the Legislature intended to do a thing forbidden by the Constitution. This legislative determination of public policy in respect to those contracts is binding upon the Courts and must be accepted by the Courts.

In Ottumwa Ry. & Light Co. vs. City of Ottumwa, et al., 173 N. W. 270, the Court said:

> "3. The Legislature is the custodian and the final arbiter of what is sound public policy, and has the power to declare what has been condemned as against public policy shall be the policy of the State; its enactment being in itself sound public policy."

City of Belfast vs. Belfast Water Co., 115 Me. 234, 98 Atl. 738.

(e) Neither the defendant companies nor the Railroad Commission will be permitted to do indirectly what they cannot do directly; that is, strike down a solemn contract with a municipality which the Legislature of the State has said shall be preserved.

It is claimed by the defendant companies that, since the rate has been raised by the Commission on other lines, this contract

with Decatur, fixing a rate of five cents, is an unjust discrimination against the public—that it is a legal wrong.

It appears, however, from the record, that this increase was brought about by the application of the Power Company. It was done by the Commission at the instance and request of the Power Company. It was the Power Company which brought about the increase. It is boldly asserted by the defendant companies that, notwithstanding the increase was brought about upon their application, at their instance and request, that the inequality thus made creates a discrimination which annuls their contract with the Town of Decatur.

If such a proposition were not boldly asserted, we could hardly believe that a good lawyer would insist on it. We are certain that no man with any respect for his contracts would claim it. It is on the face of it so unconscionably wrong that we are certain no Court would enforce it.

It is a familiar rule and an old maxim of the law that no person will be permitted to take advantage of his own wrong.

The position of the Power Company in the instant case is illustrated by the story of the woman who came to a lawyer to employ him to obtain a diovrce for her. The lawyer asked her what grounds she had for a divorce. "Huh, I can prove that my husband wasn't the father of my last child," she said.

The companies seek a divorce from a solemn contract upon the ground that they, the companies, have raped the law or have gotten the Commission to do it.

The companies cannot break their contract of 1903 directly. Will they be permited to do so indirectly by bringing about, through the Commission, an increase in rates on other lines and then be heard to say that their contract with Decatur is no longer valid because it is now discriminatory? If their act in thus bringing about an increase on other lines could be said to bring about an unjust discrimination, the law would not permit them to take advantage of their own wrong.

We have clearly shown there can be no unjust discrimination when a rate is fixed by a contract based upon a reasonable consideration, as the contract with Decatur is.

We have clearly shown there can be no unjust discrimination when the contract fixing a rate is made with a municipality for the benefit of the general public; that such a contract is not against public policy as being unjustly discriminatory.

The Legislature of Georgia has indicated that such a contract is not against public policy by a legislative act which preserves such a contract.

It is not within the power of the Railroad Commission, by any direct act, to annul this contract, because it has no jurisdiction over this contract.

Will these companies, by an order obtained from the Commission, be permitted to do that indirectly, that is, srike down a solemn contract, which neither the companies nor the Commission can do directly? If so, then the companies, acting through the Commission, can indirectly strike down a contract which the Legislature of Georgia, the sovereign power of the State, has said shall be preserved—shall not be stricken down! In that event, the companies and the Commission become a law unto themselves—superior to the sovereign power of the State- The creatures of the State are greater than the creator! We think that no Court will ever hold that any such can be done.

(f) The defendants are estopped from raising this question of discrimination.

In People ex rel. Jackson vs. Suburban R. Co., 178 Ill., 594, 53 N. E. 349, it is said:

> "An ordinance of R. authorizing defendant to enter and use its streets for the operation of a street suburban railroad to Chicago, provided that the fare between any point in R. and the City of Chicago should not exceed the fare charged from any point in the town of C., etc., to the same point,

or return. Held that, by the acceptance of the ordinance, defendant was estopped to deny that the exaction of a greater sum from R. to Chicago than from C. was an unreasonable and unjust discrimination aginst the public."

In Murphy vs. Worcester Consol. St. Ry. Co., 199 Mass., 279, 85 N. E. 507, the Court says:

"5. Pub. St. 1882, C. 113, Sec. 43, provides for the fixing of fares by the directors of a street railway, section 44 provides that on certain applications the Board of Railroad Commissioners shall revise and regulate fares, etc., and section 45 provides that nothing in the two preceding sections shall authorize a company or the board to raise the fare above the rate established 'for a locality,' by agreement made as a condition of location or otherwise, except by mutual agreement with the local authorities. St. 1898, p. 743, c. 578, Sec. 13, in force October 1, 1898, in effect withdrew the right of municipal officers to impose conditions regulating and restricting fares, but confirmed prior locations and continued them, subject to regulations or conditions in force. Held that, in view of the statutes, the municipal officers, granting a location under which a street railway was organized, prior to October, 1898, could impose restrictions as to fares not unlawful in themselves, and the reasonableness thereof could not be thereafter questioned by a street railway company organized on the basis of such location and restriction.

"6. By Pub. St. of 1882, Sections 43-45, the Legislature intended to give the Board of Railroad Commissioners power to regulate fares charged by street railway companies, whether or not fixed in accordance with restrictions imposed by municipal officers, subject to the condition that fares so established for a municipality should not be raised, except by mutual agreement with such officials; and even if the fares between a city granting a location and another city in the State was not established for locality, within the meaning of the statute, a street railway company cannot complain of the fares fixed in granting a location, when no attempt has been made to have the fares revised by the Railroad Commissioners.

"8. Where the reasonableness of restrictions imposed in granting a location to a street railway are questioned in an action, only their validity at the time they were originally imposed is to be considered.

Page 511. "And it may be added that we do not understand it to be contended that this restriction created any undue burden upon the street railway company when it was first imposed. Neither the defendant's answer for the agreed facts go further than to state that the charge of half rates yields at present less than the cost of carriage, by reason of the increase in the last six years of the cost of maintaining and operating the defendant's railway. But we can pass only upon the validity of the restriction as originally imposed and assented to by the defendant's predecessor in title and voluntarily assumed by the defendant."

Page 512. "Accordingly, a mandatory injunction should be issued requiring the defendant to provide to pupils in attendance upon the Worcester Normal School transportation between Clinton and said school, at one-half the regular fare while going to and from school. So ordered."

Pages 508-509. "Thi sis a bill in equity brought by the selectmen of the Town of Clinton to compel the defendant to carry pupils in the Worcester Normal School, in Holy Cross College, in the Worcester Business Institute, and in other schools in the City of Worcester, between Clinton and these schools, at one-half of the regular fare charged to other passengers. The defendant has succeeded to the property, franchises, liabilities and obligations of the Worcester & Clinton Street Railway Company, through a conveyance from this corporation to the Leominster & Clinton Street Railway Company, and another conveyance from the last-named corporation to the defendant. In the grant of location from the selectmen of Clinton to the Worcester & Clinton Street Railway Company, which was accepted by that company on November 9, 1897, is this provision: Said company further agrees to provide to pupils in attendance upon the public schools, the State Normal School of Worcester or any school in Worcester, transportation to such pupils at half price while going to and from schol."

"The main question in this case is as to the validity of this restriction. The defendant contends that its requirement is invalid and unconstitutional, that it creates an arbitrary and unreasonable discrimination between different classes, of the traveling public, in violation of articles 6 and 7 of the Declaration of Rights in our State Constitution; and that it violates the provisions of the Fourteenth Amendment to the Constitution of the United States in that is effect is to deny to the defendant equal protection of the laws and to deprive it of its property without due process of law and without just compensation. Lake Shore & Michigan Southern Railway vs. Smith, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858. But it first must be considered whether the defendant is entitled to raise this question."

See also:

Oregon Short Line vs. Northern Pacific R. Co., 61 Fed. 158 (1).

It is only where the discrimination inures to the advantage of one man in consequence of some injustice inflicted on another that the law interferes for the protection of the latter.

Boerth vs. Detroit City Gas Co., 152 Mich. 654, 116 N. W. 628.

Intervenors are not in court complaining that the rate paid by them is too high. They do not complain of any injustice done them. Hence there can be no unjust discrimination against them. The companies are not complaining of the rate being too high. Hence there is no one in court of the defendants complaining of the seven-cent rate. The substance of their complaint is, that the persons who use the North Decatur line should be required to pay seven cents instead of five, although a raise in the rate of the North Decatur line would not enure to the benefit of the defendant intervenors, but can only result in detriment to the general public who use the North Decatur line.

XXIV.

THE INTERVENORS, HACKMEN, ET AL. TAKE THE CASE AS THEY FIND IT. THEY CAN CLAIM NO OTHER OR GREATER RIGHTS THAN THE DEFENDANT COMPANIES. THE GRANT O FAN INJUNCTION BEING PROPER AGAINST DEFENDANT COMPANIES IS THEREFORE PROPER AS TO INTERVENORS.

Intervenors must stand or fall unon such defenses, and such only as defendant companies may be able to make in the instant case, they cannot raise new issues or other and outside issues which defendant companies cannot make or raise. They are estopped in the same way that defendant companies are estopped, as indicated by the authorities cited in this brief.

Railway Company vs. Pope, 122 Ga. 577 (1);

McGaskill vs. Bower, 126 Ga. 342, 343;

Booth vs. State, 131 Ga. 750 (4);

Worsham vs. Ligon, 147 Ga. 39 (1) and (2);

Seaboard Ry. vs. Knickerbocker Trust Co., 125 Ga. 463;

Atlanta, etc., Ry. vs. Carolina, etc., Cement Co., 140 Ga. 650.

Special attention is called to the plea to the intervention and to the demurrer to the intervention. The demurrer to the intervention sets forth good reason in law and equity why the intervenors should not be made parties defendant, or, if made parties, are bound by whatever judgment may be rendered in the case against defendant companies. While the trial court could not pass upon this demurrer, the court had the right to consider this demurrer, and doubtless did consider it. The argument made herein and the authorities cited in this brief will apply to the intervenors, and we invoke the principal of law as stated in this brief as to said intervenors.

The intervenors made no complaint to the Commission and no objection before the Commission to the raising of these rates, and it does not appear that they now make any such objection,

and they should not now be heard to complain of any difference in rates.

It does not appear for whom they are appearing. If intervenors are appearing as representatives of defendant companies and are asking for an increase in rates for and on behalf of defendant companies, they have no standing in court for this purpose, and cannot be made parties. If their interest is adverse to that of defendant companies, they have no standing in court, and cannot be made parties.

The intervenors are strangers to the pending cause, and it is not shown that it is necessary to their protection that they be allowed to become parties in this case. If they have any right in law or equity to attack said contract of 1903 with the Town of Decatur as invalid or unenforceable, they must proceed in a separate suit for that purpose.

"Where a bill contains no allegations connecting third persons with the subject matter of the litigation, complainant cannot be compelled on application to make him a defendant to the bill, and he should not be made a party."

Doke vs. Williams, 34 So. 569 (1).

"A stranger cannot be admitted as a party to a pending suit as complainant or defendant without complainants consent * * * especially where petitioners intervention could raise new issues."

Shepard vs. Light Co., 74 Atl. 141 (3).

"A party cannot stand as the representative of others to whom his own interests are hostile and adverse."

Beecher vs. Foster, 42 S. E. 647 (3).

"It is not the right of a stranger to a pending cause to intervene therein, unless it is necessary to his protection that he be allowed to become a party to the litigation, and this affords an opportunity to resist the rendition of a judgment which would operate to his prejudice."

Clarke vs. Wheatley, 113 Ga. 1074.

"They have no right to be made parties over objection of complainant."

20 R. C. L., page 683.

"General rule is a stranger will not be permitted on his own aplication to become a party."

16 Cyc. 201.

It further appears as shown by the plea to the intervention that the City of Atlanta has a contract with the Electric Company, whereby the Electric Company agreed, as part consideration for said franchise, to pay each year a certain per cent of its gross income to the City of Atlanta as a franchise tax; that this franchise contract also provides for free transfers and also requires the Electric Compny to pay the full amount of the cost of paving 15 feet of those streets where there are double tracks of railway and 11 feet where there are single tracks, and the paving is done under the assesmnet plan.

Certain of these intervenors, it appears, reside in the City of Atlanta. They come into court for the purpose of striking down the rights of the Town of Decatur in the franchise contract which they say discriminates against them or the city or locality in which they reside, and they hold to their bosoms franchise contracts just as amenable to attack on the same grounds, and yet they show no effort to surrender their contracts.

They come into this court, therefore, with unclean hands, with admittedly unclean hands, and are, therefore, without equity.

It further appears that the constituted authorities of said localities and cities do not see fit officially to intervene in this cause for the purpose of attacking the franchise with the Town of Decatur on the ground that the same discriminates against their city or locality.

For that reason, the intervenors have no standing in court, because they and each of them are powerless to do equity in the premises.

Moreover, the intervenors can invoke no Federal question in this Court. They are not parties to the contract and own no interest in the companies. Hence they have no contract or property rights which have been invaded and the clauses of the Federal Constitution invoked by the companies have no application to the intervenors. If they complain of anything, it is only of discrimination and that is not a Federal question in this case.

XXV.

NO ALLEGATIONS BY PLAINTIFFS IN ERROR TO SHOW VALUE TO THEM OF ABANDONMENT OF ATLANTA RAILWAY LINE.

Attention is called to the fact that the Electric Company, by the permission of the Town of Decatur, to take up and abandon the operation of the Atlanta Railway Company line, has for twenty years saved the expense of operating and maintaining this line, but it does not anywhere in its pleading allege what it has saved during these twenty years by the abandonment of this line, nor does it allege what it is now saving, and there is no way for the Court to detetrmine what was and still is the value of this concession made by the Town of Decatur to the Electric Company. This value bears directly on the five cents rate and the Court cannot determine whether the rate is compensatory or not until informed what is the value of this continuing concession. Regardless of the validity of the contract of 1903, the plaintiffs have failed to allege facts sufficient to show that the rate is non-compensatory.

Franklin Telegraph Co. vs. Harrison, 145 U. S. 459, 36 L. Ed., 776, and see opinion p. 779 L. Ed., as to value of right surendered.

XXVI.

THE CASES CITED IN THE BRIEF OF PLAINTIFFS IN ERROR ARE EITHER NOT PERTINENT OR MAY BE DISTINGUISHED UPON THE FACTS FROM THE INSTANT CASE AS WE THINK THIS COURT WILL SEE UPON EXAMINATION OF THESE CASES.

The legal principles involved in this case, we think, are covered by the authorities cited in our brief, and sustain our contentions.

The agreement of 1903 is a contract, not a regulatory ordinance, and does not purport to surrender the power of the State to regulate rates.

In this respect it differs from the cases cited in plaintiffs in error's brief, pages 26 and 27, such as the San Antonio case, 255 U. S. 547 and Home Telephone Co. case, 211 U. S. 265, and other similar cases cited by plaintiffs in error.

The cases from Georgia such as Americus Railway and Light Co. case, 136 Ga. 25, and Horkan case, 136 Ga., 561, cited in brief of plaintiffs in error, pages 25 and 27, have no application. Under the Georgia Constitution (Sec. 6563) cities cannot incur debts and bind subsequent councils for longer than one year without the preliminary sanction of a popular vote. Those cases deal with that question and clearly have no place in this brief.

In So. Iowa Electric Co. vs. Chariton, 255 U. S. 539, the statute of Iowa gives cities power to regulate rates but "forbids any abridgement of the power by ordinance resolution or contract." Hence the power to contract is expressly forbidden. Central Power Co. vs. City of Kearney, 274 Federal 253, is another case like the Chariton case. The cases cited by plaintiffs in error, pages 26 and 27, are distinguished from the instant case in that in those cases either there was no contract but only a regulatory ordinance, as in the San Antonio case, or else there were express statutory provisions giving the power to regulate, but expressly forbidding the making of a contract as to rates.

In the cases like City and County of Denver vs. Stenger, 277 Federal 865 and other cases like it, pages 28 and 29 of brief of

plaintiffs in error, there existed the dominant power to regulate and the ordinances in question were not contractual in form but regulatory in form, hence the courts construed them as regulatory only rather than contractual; and this interpretation was also adopted because to construe them as contracts would bring them in conflict with Constitutional provisions of the State. They rest upon the same principles as the San Antonio case, that where the dominant power to regulate exists an ordinance not contractual in form will be referred to an exercise of the regulatory rate-making power, rather than the power to contract. Especially is this true if the interpretation as a contract would bind the State to something it could not revoke and therefore bring the contractual interpretation in conflict with a provision of the State Constitution prohibiting the granting of irrevocable special privileges and franchises.

The cases cited, page 30 of plaintiffs in error's brief, such as Wyandotte Gas Co. vs. Kansas, 231 U. S. 622, have no application and throw no light upon the questions in this case.

The Georgia Constitutional provision referred to (Code 6463), simply confers upon the General Assembly the power of regulating passenger tariffs, etc. It is recognized that this power is lodged in the Legislature, and that at any time it can take it over by placing the North Decatur line under the jurisdiction of the Railroad Commission of Georgia as to fixing of fares thereon. But until it does so the contract between the parties must stand.

In the Tampa case the Legislature gave the cities and towns of Florida the power to fix rates, but said by the same Act that this should not impair any valid contract.

This Court said in that case: *This it had the right to do. It was not bound* to exercise the whole power vested in it by the Constitution, but might grant so much of such power to the corporate authorities as it deemed best for the public interests."

Tampa Waterworks vs. Tampa, 199 U. S. 246.

This is not such a contract as can be terminated upon notice by either party. The cases cited by plaintiffs in error such as Bearden Merc. Co. vs. Madison Oil Co., 128 Ga. 703, and Risley vs. City of Utica, 179 Federal 875, cited on pages 32 and 33 of brief of plaintiffs in error, have no application to the instant case. They are contracts for the sale of articles. The Bearden case is a contract for sale of hulls where one party agrees to deliver and the other agrees to take at a certain price. The Risley case is one for the sale of water to a city where the city agrees to take the water at a certain price as long as the Company furnished it. The courts have held that contracts of sale can be terminated where no time limit is specified. In such cases no harm is done either party. One gets the articles sold and the other gets his pay for them.

In the other cases cited, such as the Marshal case, 136 U. S. 393, the court permitted the removal of the shops upon the ground that there had been substantial compliance with the contract by the shops remaining there quite a number of years, construing this as a compliance with the word "permanent" used in the contract.

But the contract in controversy is quite a different matter. Decatur cannot by notice annul the franchises granted to the Company. One of these was permission to take up from the streets of Decatur another railway line which extended from Decatur to Atlanta, and to cease its operation. This can not be restored. Another grant was the right to double track on the streets of Decatur. This the Company has done and now enjoys that franchise. Decatur cannot terminate that franchise. If Decatur is bound then the Company is bound. See authorities cited in this brief on this question.

The authorities cited, pages 33 to 39 of brief of plaintiffs in error, do not sustain the propositions stated in the brief, as will clearly be seen by examination of these authorities, without attempting to discuss the cases cited.

They are mainly cases involving a conflict between intra state and interstate rates and the authority of Congress to control in-

terstate rates and in the exercise of this power to nullify an inra state rate where it interferes with interstate commerce: as

Houston, etc., Railroad Co. vs. United States, 234 U. S. 342, American Railway Express Co. vs. South Dakota, 244 U. S. 617;

or the validity of rates fixed by statute or by a Railroad Commission under State authority on common carriers, as

Smyth vs. Ames, 169 U. S. 466.

Chicago Railway Co. vs. Minn. 134 U. S. 418.

Vandalia Railway Co. vs. Schnull, 255 U. S. 113,

which can have no application to the instant case where the rate is fixed by agreement between the parties.

The cases cited by plaintiffs in error in their brief, pages 41 to 46, are all easily distinguished from the instant case. In the first place they involve statutes of the State, not contracts. And they further involve a discrimination between one corporation and oher like corporations doing the same character of business, such as the Stock Yards case of

Cotting vs. Goddard, 183 U. S. 79;

or such an unreasonable classification as imposing an attorney's fee and costs upon railway corporations without applying the same to other corporations and individuals, as in

Gulf, etc., Railway Co. vs. Ellis, 165 U. S. 150.

and the case of

Producers Trans. Co. vs. Railroad Commission of California, 251 U. S. 228, which

involved the jurisdiction of the State Commission over pipe lines where the Commission had jurisdiction, without any exception as to contracts, as in the instant case.

The Act of Legislature attacked in Leonard vs. Am. Life & Annuity Co., 139 Ga. 274, made an arbitrary distinction between certain life insurance companies, that is an arbitrary discrinmination between corporations doing the same business, and clearly has no application to the case at bar.

None of these cases on the subject of classification touch the instant case.

We call attention to this fact further that there was no assignment of error to the Supreme Court of Georgia based on the Act of 1907 as amended by the Act of August 18, 1919, so that the later Act cannot be considered by this Court.

See page 43 of plaintiffs in erro's brief and assignments of error to Supreme Court of Georgia (Transcript pages 31 to 38).

Hence this Act of August 18, 1919, cannot be considered by this Court in determining this question of classification.

In other words, the assignment of error to this Court on this question has been enlarged and no such question of law was presented to the Supreme Court of Georgia.

But the Act of 1907 as thus amended with its proviso, was within the power of the Legislature of Georgia, and makes a classification which is reasonable and right. Furthermore, the plaintiffs in error cannot complain thereof since the Act of 1907 simply preserves to them as well as to the municipality a contract voluntarily entered into by them in order to secure certain concessions and franchises from the Town of Decatur.

Arkansas Natural Gas Co. vs. Arkansas Railroad Commission et al. Decided March 19, 1923, No. 500, Supreme Court of U. S. and cases there cited.

In reference to the contention of plaintiffs in error that a non-discriminatory contract may become a discriminatory contract, the cases cited in the brief of plaintiffs in eror show that wherever this has been held it was because of a legislative enactment which by its terms rendered the contract illegal, or by an act of

a Commission which had jurisdiction over the very matter with which the contract attemped to deal, as in the case of

Union Dry Goods vs. Georgia Public Service Corporation, 142 Ga., 841, cited by plaintiffs in error.

There the Commission had jurisdiction over light and power rates, with which the contract attempted to deal, and there was no proviso as in the Act of 1907, preserving or excepting the contract.

The instant case can be easily distinguished from the cases cited in the brief of plaintiffs in error, in that in the instant case the Commission had no jurisdiction over this contract, and there is no constitutional provision and no legislative act, which makes this contract illegal. To the contrary, the only legislative act dealing with the matter, instead of illegalizing the contract, preserves it or legalizes it.

It is said in the brief of plaintiffs in error that the fixing of the rate by the Commission is the act of the Legislature. In reply to that, we say that the very act which gave the Commission the power to fix rates on street railways also says that this contract shall not be thereby impaired. If, therefore, you give effect to the proviso in the Act of 1907, and you must do so until it is repealed, no act of an agent acting under authority of that very enactment of the General Assembly, can have the effect of repealing it or any portion of it. If so, you must assert the absurd proposition that the Commission can repeal or abrogate a legislative act. The Commission takes its delegated authority, cum onere, with the limitation that the Commission cannot impair this contract of 1903 in exerting the power which the Legislature gives it.

No case is cited by plaintiffs in error, and none can be cited, where the Court has ever held that the act of a commission may fly in the face of and strike down a portion of the self-same act from which it gets its authority. If the reasoning of plaintiffs in error is carried to its logical conclusion, then its effect is that the Commission may destroy or repeal the proviso in the Act of 1907.

We confidently expect that these companies will be made to abide by their contract with the Town of Decatur. Contracts are sacred. It is the duty of the Courts to enforce them, whether made with individuals or with corporations. No matter how great corporations may become, they are not above the law, and the sanctity of contracts with them should be preserved as rigidly as with private individuals, especially so, when the people of the State, speaking through their representatives, have said that such contracts *shall not be impaired.*

Respectfully submitted,

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Supreme Court Of The United States

October Term 1922

No. 463

GEORGIA RAILWAY AND POWER COMPANY et al.,
Plaintiffs in Error and Petitioners in Certiorari,

vs.

THE TOWN OF DECATUR, Defendants in Error and Respondents in Certiorari.

FROM THE SUPREME COURT OF THE STATE OF GEORGIA.

Brief for Plaintiffs in Error and Petitioners in Certiorari.

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Attorneys for Plaintiffs in Error and Petitioners in Certiorari.

SUBJECT INDEX

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GEORGIA CODE SECTIONS:

In the Supreme Court of the United States

GEORGIA RAILWAY & POWER COMPANY,
GEORGIA RAILWAY & ELECTRIC COMPANY,

R. C. Hackman, C. H. Knox, G. R. MacNamara, J. T. Braswell, C. A. Virgin, J. D. Malsby, C. M. Binder, J. L. Murphy, J. R. Hardin, H. M. Ashe, P. E. Davis,C. E. Bennett, W. E. Field, H. E. Hawn, David Hawn, F. McDonald, Jr., and J. C. Gorman,

Plaintiffs in error
and
Petitioners in Certiorari

vs.

TOWN OF DECATUR,

Defendant in Error,
and
Respondent in Certiorari

No. 463

October Term 1922.

STATEMENT OF THE CASE

Town of Decatur (hereinafter called the municipality) brought an equitable petition against the Georgia Railway & Power Company (hereinafter called the Power Company) individually and as lessor of the Georgia Railway & Electric Company (hereinafter called the Electric Company).

The case was based upon a claimed contract which, plaintiff contends, fixes a 5 cents rate of fare, and that such claimed contract, together with subsequent Legislative acts, requires the operating street railway company to transport passengers boarding or alighting from cars, on the North Decatur line, within the **present** limits of the Town of Decatur, to and from Atlanta, with the right to demand and receive transfers whereby such passengers may ride over all the lines of the street railway company, for a 5 cents fare; although, under the rates fixed by the Railroad Commission

of Georgia, all the other passengers are required to pay a fare of 7 cents (except the contention as to College Park patrons discussed in case No. 464).

ALLEGATIONS AND CONTENTIONS OF PETITION AS AMENDED

Prior to 1902 the Electric Company had three lines of street railways running from Atlanta to Decatur; one the Atlanta Railway Company line; another called the North Decatur line, and the third, the South Decatur line. In December, 1902, the Electric Company commenced to take up the tracks of the Atlanta Railway Company line in the Town of Decatur, the Municipality brought an equitable suit to restrain such action. On the 10th day of March, 1903, the Municipality, by ordinance, consented to the taking up of the said tracks in Decatur. This ordinance contained a provision with reference to rates on the Main (North Decatur) line as follows, to wit:

> "To never charge more than five cents for one fare upon its Main Decatur line * * * , for one passenger, and one trip upon its regular cars from the terminus of said line in the City of Atlanta to the terminus of the same in the Town of Decatur, or from the terminus of said line in the Town of Decatur, to the terminus of the same in the City of Atlanta (Record page 57, a part of paragraph Second)."

Said ordinance accepted by the Electric Company on April 1, 1903, settled the equitable suit. (Record pages 53-58 Exhibit B.)

This provision was alleged to be a valid binding contract perpetually fixing a 5 cents fare.

Prior to 1918 the Electric Company and thereafter the

Power Company charged a 5 cents fare, together with transfers without additional costs, over all its lines.

In 1918 the Power Company made application to the Railroad Commission of Georgia to be permitted a charge of 6 cents fare, and two cents for transfers. On August 14, 1918, the said Commission held: that it lacked jurisdiction to grant the relief asked; that the Georgia Act of 1907 which put street railroads under its jurisdiction was limited by the following proviso:

> "Provided, however, that nothing herein shall be construed to impair any valid subsisting contract now in existence between any municipality and any such company and provided that this Act shall not operate as a repeal of any existing municipal ordinance." (Record page 165.)

The Commission construing this proviso held:

> "The physical existence of a contract in 1907 between the Town of Decatur and the lessor of applicant, prescribing a 5 cents maximum fare between Decatur and Atlanta is admitted * * * The question as to whether the contracts physically existent were or are valid contracts is not for us to decide * * * Our view is that when in dealing or considering dealing with rates of a street railroad, under the terms of the Act of 1907, we come face to face with a contract or an ordinance, in existence on August 23, 1907, still subsisting, we are estopped until such obstacle is removed in a legal procedure before a court of competent jurisdiction or the General Assembly further acts." (Record pages 165-166.)

In the same order the commission held that in its opinion the applicant was entitled to an increase in its street car fares, and that a fare of 6 cents would be reasonable and just, and made this recommendation to the City Authorities.

"This Commission believes that applicant is entitled to an increase in its street car fares, and that a 6 cents fare would be reasonable and just, so long as existing abnormal war conditions prevail, and the justice of granting such increases by amendment to existing contracts and ordinances, is earnestly urged upon the Councilmanic authorities of Atlanta, Decatur, and College Park, with the assurance on the part of this commission that simultaneously with the effective date of such amendment, similar provisions will be made by it as to fares in territory not included in the municipalities mentioned." (Record page 167.)

On August 23rd, 1918, the Power Company brought mandamus against the Railroad Commission and the individual commissioners to assume jurisdiction under the Act of 1907, and fix fares under the pending application. The Supreme Court (149 Ga., page 1) overruled the Commission, holding that the commission, except as to College Park and Decatur on the North Decatur line had jurisdiction to fix the fares of the Power Company, that College Park and the Town of Decatur (as to the North Decatur line) were protected by contracts, falling within the proviso of said Act.

Subsequent to said decision the Commission, on April 2, 1919, fixed for the Power Company a rate of 6 cents (except where fares were protected by contract with Decatur and College Park). (Record pages 75, 76 Exhibit 1.)

Subsequent thereto (September 22, 1920) the Commission fixed a 7 cents fare, except as prohibited by contracts with Decatur and College Park. (Record page 244 Exhibit C.)

On October 5, 1920, both the Electric Company and the Power Company notified the Municipality in writing denying the validity of said claimed contract and expressly notified

it that on and after October 20th, 1920, the fare provision of the ordinance of 1903 would be terminated. (Record pages 58, 59 Exhibit D.)

This notice caused the present suit, among other things, praying that both the Electric Company and Power Company be perpetually enjoined from charging a higher fare than 5 cents from an point within the **present** limits of Decatur to Atlanta and from Atlanta to any point within the **present** limits of Decatur. (Record pages 49, 74, 75.)

ANSWERS AND CROSS BILLS OF ELECTRIC AND POWER COMPANIES AND OF NUMEROUS INDIVIDUAL PATRONS OF THE STREET RAILWAY COMPANIES.

Both the Electric Company and the Power Company filed original and amended answers and cross bills (Record pages 218-239 and 245-251, 252, 253). Approximately 20 street car patrons (hereinafter called intervenors), some living on the North Decatur line, between the present boundary of Decatur and City of Atlanta; and some residing on the South Decatur line, and daily using these lines, were made by the Court's order defendants in said case, and filed answers and cross bills wherein they adopted the allegations of the answers and cross bills of the railway companies (Record pages 254-258).

These answers and cross bills alleged substantially as follows:

The Power Company with 212 miles of single track, 157 miles of which is within the City of Atlanta, furnishes street railway transportation to Atlanta and its vicinity. Both the North and South Decatur lines run from Atlanta to Decatur. The North Decatur line beginning at the corner of Pryor Street and Edgewood Avenue in Atlanta, runs over various streets to the corporate limits of Atlanta, 4.724 miles, thence through Kirkwood, thence over private rights of way, thence over public roads of DeKalb County to the former limits of the Town of Decatur, thence in Decatur .993 making a total length of 6.417 miles, only .993 miles being within the corporate limits of Decatur, as they existed in 1903 .

At the time of the mandamus d ion supra (149 Ga. page 1) the Power Company charge ver all its lines the uniform rate of 5 cents, with free transfers and under the order of Commission of April 2, 1919 (Record pages 75, 76),

that Company charged a 6 cents fare until the Commission's order of September 22, 1920, when thereafter it charged 7 cents fare, except to College Park traffic and Decatur traffic riding on the North Decatur line. (Record page 244 Exhibit C.)

Thus the State of Georgia, through its Railroad Commission, fixed a rate of 7 cents for all passengers on the North Decatur line, except as to passengers leaving or boarding said line within the corporate limits of Decatur; and fixed a rate of 7 cents for all passengers on the South Decatur line.

The Commission discussing the North Decatur line 5 cents fare in its order of September 22, 1920 said:

> "The 5 cents fare now in effect on the Main Decatur and College Park lines, contracted for under vastly different conditions than now exist, are not **fairly compensatory,** and as to the patrons of the company on other routes, and on intermediate territory on these routes, **are discriminatory.** This commission is without authority to increase them."
>
> (Record page 244 Exhibit C).

Thereafter both the Electric Company and the Power Company, on the 5th day of October, 1920, served the municipality with the following written notice:

> "TO THE MAYOR AND COUNCIL OF THE TOWN OF DECATUR AND TO THE TOWN OF DECATUR:
>
> You are hereby notified that on and after the 20th day of October, 1920, the fares to and from Atlanta and Decatur on the Main or North Decatur line operated by the Georgia Railway & Power Company will be at the rate of seven (7) cents.
>
> Denying the validity or legality of any so-called contract provisions limiting such fares to five (5) cents

(set out in an ordinance of the Town of Decatur and the Georgia Railway & Electric Company); you are notified that even if the provision with reference to fare, to and from Atlanta and Decatur, was binding at any time, it is not now binding or legal, and is hereby terminated from and after the above named date.

This 5th day of October, 1920."

(Record pages 58-59 Exhibit D.)

The grants from the Town of Decatur under which the parts of the North Decatur line, within its limits were constructed, contained no provision with reference to fares. (Record pages 240-244.)

To permit Decatur patrons on the North Decatur line (by virtue of the rate ordinance of 1903) to pay only a 5 cents fare over the whole street railway system, while other patrons by the actions of the State are required to pay 7 cents, would be unjust and discriminatory against all other municipalities and all other individual patrons, except the Decatur passengers using the North Decatur line; and would force the power company to violate the State Constitution (Sections 6464 and 6467) against discrimination.

The effect of a 5 cents fare, to Decatur passengers, on the North Decatur line, and a 7 cents fare all elsewhere is to establish on the same line, on the same cars, two separate and distinct fares, the smaller fare being charged for the longer haul and the greater service, and the larger fare for the shorter haul and less service; and also creates unjust discrimination between Decatur patrons using the North Decatur line and those using the South Decatur line.

Two such rates of fare, as above set out, affecting the entire street railway system, as to other municipalities, the intervenors and all other passengers (save only Decatur patrons on the North Decatur line), violates the 14th Amendment of the Constitution of the United States, in that

it denies to them the equal protection of the law as therein guaranteed.

As against the existence and validity of the 5 cents fare both the street railway companies and the intervenors contended:

FIRST:

(a) Neither the municipality nor the railway companies have power to make binding rate contracts.

(b) Said parties are prohibited, from making contracts for fixed fares, irrevocable and unlimited as to time, under the Constitution of the State of Georgia, as set out in Sections 6389, 6464, 6469 and 6563 of the Code of 1914.

SECOND:

If said fare provision had ever been a contract it had been terminated prior to the present suit.

(a) By complete performance;

(b) By adequate notice of its termination;

(c) By action of the State of Georgia, through the commission, rendering compliance with said 5 cents fare discriminatory and confiscatory; by increasing the quality and quantity of service, over and above that provided for in the claimed contract.

(d) By Legislative acts of the State of Georgia (Acts 1914 page 703 and 1916 page 681) extending the territorial limits of the 5 cents fare provision, by extention of the corporate limits of Decatur.

If the said Acts of the State of Georgia and said orders of the Railroad Commission (c) and (d) supra, are legally valid, they themselves terminated the claimed fare provis-

ion of the ordinance of 1903; or justified its termination by the railway companies; or required the Court to declare it terminated in this proceeding.

As a result of said acts and orders the cost of Decatur traffic on the North Decatur line was 9.29 cents per passenger (without regard to any return upon its property) and compliance therewith made the 5 cents fare discriminatory, confiscatory and violative of the 14th amendment of the Constitution of the United States:

If said fare provision is still a valid, subsisting and binding contract; then various legislative acts and Acts of the State through its Railroad Commission are illegal and unconstitutional, in violation of Article 1, Section 10, of the Constitution of the United States, in that said state actions impaired the obligations of said contract by placing increased burdens upon the railway companies not provided for and set out in said contract.

The State's actions thus attacked were as follows:

(a) The orders of the Railroad Commission of September 22, 1920 (Record page 244 Exhibit C) requiring an increase in the quality and quantity of service to the Decatur patrons (on the North Decatur line) over and above that provided for in the contract.

(b) The Commission having held that free transfers were not required by the contract (Record page 166), by its order of April 2, 1919 (Record page 76) required the issuing of free transfers thereby increasing the obligations of the contract.

(c) The Acts of 1914 (page 703) and the Acts of 1916 (page 681) extending the corporate limits of Decatur, if construed by the Court, as extending the 5 cents fare to that part of the line thus taken into its limits.

Prior to the passage of said acts the railways, under contracts from the County of DeKalb (Record page 247, paragraphs 10, 11, 12, 13 and 14) constructed the portions of the line thus taken into the municipality in which there were no provisions as to fares. If said acts extended the 5 cents fare over said portion of the line, they impaired the obligation of the DeKalb County contract, contrary to Article 1, Section 10, of the U. S. Constitution.

(d) The Legislative Act (Georgia Laws 1907, page 73, et seq.) amended by the acts of 1919 (Georgia Laws 1919, page 94) (as construed and enforced by the highest State Court) renders said act unconstitutional, in violation of the 14th Amendment to the Constitution of the United States, for as so construed said act permitted the Railroad Commission to change all contract rate of fare between street railway companies and private parties, whenever made; all contract rates between street railway companies and municipalities subsequent to August 23, 1907; all contract rates between street railway companies and municipalities prior or subsequent to 1907, where the street railway company has its principal office and operate lines of Railroad in counties having a population of not less than 75,000 nor more than 125,000, excluding only from the jurisdiction of the Commission rate contract with municipalities in counties having a population under 75,000 or over 125,000 of date prior to August 23, 1907. The said Acts and amendment so construed, fixed a discriminatory, illegal and an unreasonable classified scheme of rates and deny the street railway companies, its individual patrons and the municipalities of Georgia the equal protection of the law guaranteed to them by the 14th Amendment to the Constitution of the United States.

(e) If the orders of the Commission (heretofore referred to) are held by the Court to be valid and legal, then the Act of August 23, 1907 (Georgia Laws 1907 page 73 et seq.), as thus construed, and enforced empowers the Commission as

to Decatur traffic, on the North Decatur line, to render its costs confiscatory, while it withholds from the Commission the jurisdiction to fix reasonable rates therefor, thereby confiscating the property of the street railway companies, and deny to them the equal protection of the law guaranteed by the 14th amendment of the Constitution of the United States.

The cross bills also set up and allege, that if the court should hold that the rate provision of the claimed contract was still of force and effect; the Electric Company and the Power Company offered to surrender all rights to operate its said North Decatur line within the present limits of Decatur. The costs of operating the North Decatur line within the present limits of Decatur amounted to 9.29 cents per Decatur passenger, said amount being now and for all time confiscatory, not paying but about one-half of the operating expenses without any return for the service rendered. To compel such operation is in violation of the 14th Amendment to the Constitution of the United States in that it confiscates the property of the street railway company and denies to them the equal protection of the law. The railroad companies asked a decree, if the claimed rate provision was still in force and effect, permitting them to cease all operation of the North Decatur line within the limits of Decatur and in connection therewith, the intervenors contended that if the deficiency in the North Decatur fares be indirectly transferred to them by the Commission, increasing the fare they must pay, then they would be deprived of their property in violation of the 14th Amendment to the Constitution of the United States.

The prayers in the answers and cross bills were in accordance with the allegations therein. (Record pages 239, 257 and 258.)

RULINGS OF THE COURT

The Superior Court of DeKalb County granted the municipality a temporary restraining order and it was affirmed by the Supreme Court on writ of error. (Record pages 19-23; 152 Ga. 143-148). Thereafter the Judge of the Court, on general demurrer, struck the amended answers and cross bills of the street railway companies (Record page 207) and of the intervenors (Record pages 217-218); and then directed a verdict for and rendered a final decree in favor of the municipality, granting all the prayers of the petition and permanently enjoining the railway companies as prayed in the petition as amended. (Record pages 258-259). These judgments on the demurrer, direction of the verdict, and the granting of the decree were excepted to (Record pages 23-39) and carried by writ of error to the Supreme Court of Georgia and there affirmed. (Record pages 15-19) (153 Ga. 329-335.)

EFFECT OF JUDGMENT ON DEMURRER AND DECREE.

The effect of the judgments sustaining the demurrer, directing a verdict and rendering a decree was: (a) to hold the 5 cents contract rate still in force; (b) extend its operation to that part of the line **subsequently** taken into the **present territorial** limits of Decatur; (c) to uphold and compel performance of the subsequent orders of the Commission and Legislative Acts, as against the attacks made on them in the answers and cross bills, as amended; (d) to deny to the railway companies the right to terminate the claimed fare contract or the right to discontinue the operation of their line within Decatur.

JUDGMENT SUSTAINING GENERAL DEMURRER TO ANSWERS AND CROSS BILLS.

The various rulings, judgments and decreees of the State Court are brought to this Court for review, both by writ of error and petition for certiorari. The granting of the general demurrer to the answers and cross bills, as amended, is an admission of the truthfulness of all the facts therein set out.

SPECIFICATION OF ERRORS RAISED AND RELIED UPON

The assignments of error brought to this Court for review are:

(1) Under the undisputed facts in the case, forced compliance by the Railway Companies, plaintiffs in error, with the ordinance of the Mayor and Council of the Town of Decatur, made applicable to said railways, dated April, 1903, binding said railway companies,

plaintiff in error, among other things;

"To never charge more than five cents for one fare upon its (plaintiffs in error's) main Decatur line * * * for one passenger and one trip upon its regular cars **from the terminus** of said line in the City of Atlanta **to the terminus** of the same in the town of Decatur,"

confiscates the property of the Georgia Railway & Electric Company and the Georgia Railway & Power Company.

(a) The State Court erred in not holding said provision unconstitutional as violative of the Fourteenth Amendment to the Constitution of the United States.

(b) The State Court erred in holding that said provision constituted a contract between the Mayor and

Council of the Town of Decatur and the Georgia Railway and Electric Company and Georgia Railway and Power Company, because (1) neither of said parties had any right, power or authority to make binding contracts as to fares; (2) said parties are prohibited from making contracts for fixed fares, irrevocable and unlimited as to time, by the Constitution of the State of Georgia, set out in Sections 6389, 6464, 6467 and 6563, of the Code of 1914 of said State.

(c) Said State Court erred in not holding that if said provision was ever a contract; it had ended prior to the pending suit; by complete performance; by adequate notice of its termination; by the action of the State of Georgia, through the Commission, by which further forced compliance with said five cents fare was rendered discriminatory and, therefore, illegal and confiscatory; by the action of the State of Georgia, through orders of the Railroad Commission, requiring the giving of transfers on payment of said five cents fare (thus entitling Decatur passengers to ride over the entire street railway system for five cents, while other passengers on the same line and for less identical character of service, are required to pay seven cents), and by orders of said body increasing the quality of service over and above that provided for in the claimed contract; by the legislative acts of the State of Georgia (Georgia Acts 1914, page 703, and Georgia Acts 1916, page 861) extending the corporate limits of the Town of Decatur.

The State Court held that all of said orders and acts of the State were and are legal, valid and binding, and forced compliance therewith. This said construction by the Court of the ordinance of April 1903, together with forced compliance by said railway companies with said orders and acts of the State aforesaid, render the rate

provision of said ordinance invalid and violative of the Fourteenth Amendment to the Constitution of the United States, in that it confiscates the property of plaintiffs in error and denies them the equal protection of the law guaranteed therein.

(2) Under the undisputed facts in the case, forced compliance with said ordinance of April, 1903, to wit:

"To never charge more than five cents for one fare upon its (plaintiffs in error's) main Decatur line * * * for one passenger and one trip upon its regular cars from the terminus of said line in the City of Atlanta to the terminus of the same in the Town of Decatur,"

violates the Fourtenth Amendment to the Constitution of the United States as to the individual intervenors in said case, in that it denies to them and all other citizens and patrons, than those leaving or boarding the cars of the street railway companies in the Town of Decatur, the equal protection of the law as therein guaranteed; that said provision of said ordinance, and the action of the State of Georgia by and through the Railroad Commission of said State, and the construction placed upon same by the State Court, required the individual intervenors and all other citizens (except Decatur patrons) to pay seven cents for the same or less service while Decatur patrons, for a similar or greater service, are charged only five cents.

(3) Because of the legislative act of the State of Georgia (Acts of 1907, page 73 et seq.) as construed and enforced by the State Court, and amended by the Act of August 18, 1919 (Georgia Laws 1919, page 94);

(a)

Renders said act unconstitutional and violative of the Fourteenth Amendment to the Constitution of the

United States; in that it denies the plaintiffs in error, individually and collectively, the equal protection of the law and fixes a discriminatory and illegal scheme of rates, in that said act places under the jurisdiction of the Railroad Commission of Georgia the right, power and authority to change rates of fare fixed in all contracts except valid, subsisting contracts in existence on August 23, 1907, between any municipality and any street railway company having its principal office and operating lines of railroad in counties having a population of less than 75,000 and more than 125,000. There is no legal or reasonable classification with reference to the contracts executed and those placed under said Commission's jurisdiction, and as a result of said discriminatory exception, the individual plaintiffs in error and all other patrons of the street railway companies, except those boarding or alighting from cars in Decatur, are required to pay seven cents fare, while those boarding or alighting from cars in Decatur pay only a five cents fare.

(b)

Said Act of 1907 (Georgia Acts 1907, page 73 et seq.) as construed and enforced by the court, violates the Fourteenth Amendment to the Constitution of the United States, in that the Court holds that the said act withholds from the Railroad Commission of Georgia the right, power or authority to change the five cents fare provision of said ordinance of April, 1903 (as set out in assignment of error No. 1), but holds that said act confers jurisdiction upon said Commission to increase the quality and quantity of service rendered, and empowers the said Commission to require the issuing of transfers upon payment of the fare provided for in said ordinance; and said act, thus construed and enforced, confiscates the property of the Georgia Railway & Electric Company and the Georgia Railway & Power Com-

pany without due process of law, and denies them the equal protection of the law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

(c)

Said Acts of 1907 (Acts 1907, page 73, et seq.) as construed and enforced by the Court against the individual intervenors, plaintiffs in error, fixes an illegal and discriminatory scheme of rates, in violation of the Fourteenth Amendment to the Constitution of the United States, in that the Court holds that under and by virtue of said act, authority and powers are conferred upon the Railroad Commission of Georgia to fix a seven cents rate of fare for less or similar service rendered to the individual intervenors and other persons and patrons similarly situated, while it maintains and keeps in force a five cents rate of fare for a greater or similar service rendered Decatur patrons by the same street railway companies operating the same system and over the same lines.

(4) The Court having held that the provisions of the ordinance of April, 1903, of the Mayor and Council of the Town of Decatur, to wit:

"To never charge more than five cents for one fare upon its (plaintiffs in error's) main Decatur line * * * for one passenger and one trip upon its regular cars from the terminus of said line in the City of Atlanta to the terminus of the same in the town of Decatur,"

is a binding contract between the Mayor and Council of the Town of Decatur and the Georgia Railway & Electric Company and the Georgia Railway & Power Company, the court erred in not holding the legislative act of the State of Georgia of 1907 (Acts 1907, page 73, et seq.) as construed by the court violates Article 1,

Section 10, of the Constitution of the United States, in that said Act, as thus construed, impairs the obligation of said contract by increasing its burdens; in that the court held that under said Act of 1907, the State Railroad Commission had the jurisdiction and power to increase the quality and quantity of service rendered for said five cents fare. The court erred in not holding that said act and the orders of the Railroad Commission issued thereunder, adding to said claimed contract by increasing its burdens by increasing the service, were unconstitutional and in violation of Article 1, Section 10, of the Constitution of the United States, in that they impair the obligations of the contract upheld by the court.

(5) Under the provisions of the ordinance of the Mayor and Council of the Town of Decatur of April, 1903, towit:

"To never charge more than five cents for one fare upon its (plaintiffs in error's) main Decatur line * * * for one passenger and one trip upon its regular cars from the terminus of said line in the City of Atlanta to the terminus of the same in the Town of Decatur."

held by the court to be a contract, a five cents rate of fare is provided for only from the **terminus** of said line **in the City of Atlanta to the terminus** of the same in the Town of Decatur, or from the terminus of said line in the Town of Decatur to the terminus of the same in the City of Atlanta; the trip either way shall include the entire loop in the town of Decatur. The Court held that the legislative acts of the State of Georgia (Acts 1907, page 73, et seq.), and the orders of the Commission under and by virtue of said Act, made said five cents fare provision operative from other points in the Town of Decatur to other points in the City of Atlanta. Such construction placed upon said acts and orders im-

pairs the obligations of said contract, in violation of Article 1, Section 10, of the Constitution of the United States, in that it places increased burdens upon the plaintiffs in error, not provided for and set out in said contract, and the Court erred in not holding said acts and orders unconstitutional.

(6) Because the court, having held that the fare provision of the ordinance of April, 1903, as set out in assignment of error No. 1, constituted a contract, erred in not holding that the acts of the General Assembly (Acts 1914, page 703, and Acts 1916, page 681) violate Article 1, Section 10, of the Constitution of the United States;

(a)

In that each impairs the obligations of said contract, for that said acts, as construed by the Court, extended the five cents fare provision of said contract to territory added to the town of Decatur after the execution of said contract and extended its provisions to territory not included therein at the time the contract was executed.

(b)

Because the undisputed facts shows that the County of DeKalb entered into a contract with the Georgia Railway & Power Company and Georgia Railway & Electric Company, under and by virtue of which contract the tracks of said street railway companies were placed in the public roads of the County of De Kalb, between the City of Atlanta and the Town of Decatur, and by said contract the fares to be charged passengers boarding the cars therein were not limited to five cents. The construction placed by the Court upon said legislative act of 1914 and 1916 required the street railway companies to charge only five cents fares to passengers boarding and alighting from cars within said territory; and said acts, thus construed, impair the

obligations of said contract, adding additional burdens thereto, and the Court erred in not holding said acts unconstitutional, in violation of Article 1, Seection 10, of the Constitution of the United States; for that under said acts and said construction there is imposed a five cents fare for passengers boarding and alighting from cars in said former territory.

(7) The ordinance of April, 1903, as set out in assignment of error No. 1, and as construed by the Court, makes the said ordinance violative of the Fourteenth Amendment to the Constitution of the United States, for that it denies to plaintiffs in error the equal protection of the laws guaranteed to them by the Fourteenth Amendment to the Constitution of the United States, for that the five cents fare provision therein contained is, under the undisputed facts, confiscatory; and to compel the Georgia Railway & Electric Company and the Georgia Railway & Power Company to continue to operate under and by virtue of the same, and denying them the right to terminate all its lines under and by virtue of said claimed contract and to cease to operate its street railway lines within the Town of Decatur, and to compel said street railway companies to permanently devote their property to public use, without any compensation therefor, and to compel them to continue public service in said territory without reference to the value of the service rendered, thus confiscates the property of said companies.

(Record pages 5-10.)

MAIN CONTENTION OF MUNICIPALITY

The Municipality's case was predicated upon its contention that a valid binding rate contract existed at the time of the institution of its suit. If such contention is not sustained, a reversal will necessarily follow.

Central Power Company vs. City of Kearney, 274 Fed. 253.

Knoxville Gas Co. vs. City of Knoxville, 261 Fed. 284 (6).

Raleigh & Gaston R. R. Co. vs. Swanson, 102 Ga. 754.

CONTENTIONS OF ELECTRIC COMPANY, POWER COMPANY AND INTERVENORS.

The Railway companies and the intervenors contend:

(1) That the rate provision of the ordinance of 1903, was not a binding contract at the time of the institution of this suit.

(2) If the said rate provision is held to be a binding contract, then subsequent statutes of the State of Georgia and orders of the Railroad Commission of Georgia unconstitutionally impair the obligations of said contract in violation of Article 1, Section 10, of the Constitution of the United States; and also unconstitutionally confiscate the property of both railway companies and the intervenors, and deny them the equal protection of the law guaranteed them by the Fourteenth Amendment to the Constitution of the United States.

(3) The Legislative Acts conferring jurisdiction upon the Commission in certain cases, and withholding it in others are unconstitutional and violative of the Fourteenth Amendment to the Constitution of the United States.

(4) The street railway companies have the right under the Fourteenth Amendment to the Constitution of the United States to cease operating its North Decatur line in Decatur.

A FEDERAL QUESTION IS RAISED WHETHER OR NOT THE ORDINANCE OF THE TOWN OF DECATUR OF 1903 IS A CONTRACT.

If it be held that the claimed rate contract is still in existence, it is then contended that subsequent statutes of the State and orders of the Railroad Commission, unconstitutionally impair the obligations of said contract, in violation of Article 1, Section 10, of the Constitution of the United States.

This Court has repeatedly held that when the contract clause of the United States Constitution is invoked, this Court determines for itself (1) Is there a contract? (2) If so, what obligations arose from it? (3) Has that obligation been impaired by subsequent legislation?

> Detroit United Railway Company vs. Michigan, 242 U. S. 238, 249.
>
> Milwaukee Electric Ry. Co. vs. Wisconsin, 252 U. S. 100, 103.
>
> Stearns vs. State of Minnesota, 179 U. S. 223, 232.

This Court determines these questions for itself for the reason that otherwise the State courts might, by their decision, deprive parties of their federal constitutional rights.

> McCullough vs. Commonwealth of Va., 172 U. S. 102, 109.

Similarly, when the Fourteenth Amendment to the Constitution of the United States is invoked against an ordinance, confessedly discriminatory and confiscatory, and the claim is made that it is binding as a contract, the determination of the question is a federal question; otherwise the State Court in erroneously holding an ordinance or statute to be a contract, might defeat the constitutional guarantee

against confiscation of property, and deny a party the equal protection of the laws.

San Antonio vs. San Antonio Pub. Service Co., 255 U. S. 547.

Southern Iowa Elec. Co. vs. Chariton, 255 U. S. 539.

Headley's Admr. vs. San Francisco, 125 U. S. 639, 645.

In determining like questions this Court has refused to follow the State Court's construction of its own Constitution.

University vs. People, 99 U. S. 309, 323.

I.

RATE PROVISION OF THE ORDINANCE OF 1903 NOT A CONTRACT.

This question is raised in the first assignment of error (Record pages 5-5); see Brief page 14.

NOT IN SUBSTANCE A CONTRACT.

On March 10th, 1903, the Town of Decatur passed an ordinance permitting the removal of the tracks of the Atlanta Railway Company in the Town of Decatur (See Record pages 55, 58). The ordinance begins "Be it ordained by said Mayor and Council and it is hereby ordained by said authority" and ends "Be it further ordained that all ordinances or parts of ordinances in conflict herewith are hereby repealed." Such words as to all matters therein contained, including the rate section indicate municipal legislation and not a municipal contract.

The Town of Decatur was not undertaking to fix a rate contract for itself. Under the Constitution of Georgia (Section 6563) it could make a contract for itself for only one year.

> Americus Ry. & Lt. Co. vs. Mayor, etc., of Americus, 136 Ga. 25.
>
> City of Dawson vs. Dawson Water Works Co., 106 Ga. 699, 726.

Such contract would be operative only so long as neither party repudiated it.

> Knight vs. Suddeth & Crenshaw, 126 Ga. 231 (1).
>
> Americus Ry. & Lt. Co. vs. Mayor, etc., of Americus, 136 Ga. 25 (3).

The municipality relies to these cases, by alleging that the contract is not with or for the municipality, but one made by the municipality acting as agent for the State, and in the interest of all parties boarding or alighting from cars within the corporate limits of the municipality. (Record page 73, paragraph 18).

Such a regulation of fares, however, is governmental and not contractual.

> San Antonio Pub. Service Com. vs. San Antonio, 257 Fed. 467, affirmed in 255 U. S. 547.
>
> South Pasadena vs. Los Angeles, 41 Pac. 1004.
>
> Home Tel. & Tel. Co. vs. Los Angeles, 211 U. S., 265.
>
> State and County of Denver vs. Stenger, 277 Fed. 685.
>
> Georgia R. R. vs. Smith, 70 Ga. 694, 703; affirmed 128 U. S. 174.
>
> Milwaukee Elec. Co. vs. Wisconsin, 238 U. S. 174.

In the case of City of Arcata vs. Green, et al., 106 Pac. 86, the court in passing upon municipal action claimed to be a contract said:

> "The ordinance here does not confine its scope to any individual or number of individuals, but attempts to regulate the fares paid by the general public—all persons, wherever resident; in short, is of governmental character, and not a contract."

It is, however, conceded by the municipality that even though a contract, the State is not bound by its rate provision, but may, either by itself or by a Commission, having jurisdiction, change it at will. If this be so, then the contract provision lacks mutuality and cannot bind the street railways to this confiscatory rate.

Central Power Co. vs. City of Kearney, 274 Fed. 253 (2).

City and County of Denver vs. Stenger, 277 Fed. 865, 870.

Opelika Sewer Co. vs. City of Opelika, 280 Fed. 155, 159.

San Antonio vs. San Antonio Pub. Service Co., 255 U. S. 558.

Nor is the municipality bound by such rates.

Horkan vs. City of Moultrie, 136 Ga. 561.

Neal vs. Town of Decatur, 142 Ga. 205.

MUNICIPALITIES IN GEORGIA GIVEN NO AUTHORITY TO ENTER INTO BINDING RATE CONTRACTS.

No legislative enactments, no constiutional provision confers upon a Georgia municipality the power to make rate contracts.

City of Atlanta vs. Old Colony Trust, 88 Fed. 859.

Horkan vs. City of Moultrie, 136 Ga. 561.

Where no such power has been expressly conferred, this Court has repeatedly held that a confiscatory rate cannot be upheld on the claim that there existed a municipal rate contract.

Home Tel. & Tel. Co. vs. Los Angeles, 211 U. S. 265.

Milwaukee Elec. Co. vs. Wisconsin, 238 U. S. 174.

City of Englewood vs. Denver & A. P. Ry. Co., 248 U. S. 294.

San Antonio vs. San Antonio Pub. Service Co., 255 U. S. 547.

Southern Iowa Elec. Co. vs. Chariton, 255 U. S. 539.

GEORGIA CONSTITUTIONAL PROVISIONS PREVENT A MUNICIPALITY FROM MAKING RATE CONTRACTS.

The Constitution of Georgia prohibits the Legislature from making rate contracts. If the State cannot make rate contracts, then clearly it cannot grant such power to a municipality.

Town of Pacific Junction vs. Dyer, 19 N. W. 862, 863.

City of Mitchell vs. Board of R. R. Commissioners, 184 N. W. 246.

The Constitution of the State of Georgia, Article 1, Section 10, paragraph 2, provides: "No bill of attainder, ex post facto law, retroactive law, or law impairing the obligations of contracts, or **making irrevocable grants of special privileges or immunities, shall be passed.**"

This Court, in San Antonio vs. San Antonio Pub. Service Co., 255 U. S. 447, held that a similar constitutional provision of the State of Texas prevented a municipality of that State from entering into a binding contract and enjoined a confiscatory rate, although the municipality claimed the benefit of a rate contract.

The Constitution of the State of Georgia, Article 4, Section 2, paragraph 3, provides: "The exercise of the police power of the State shall never be abridged, nor so construted as to permit corporations to conduct their business in such a manner as to infringe the equal rights of individuals, or the general well being of the State."

In O'Keefe vs. City of New Orleans, 273 Fed. 560, the Court held that a similar provision of the Louisiana Constitution prevented a City of that State from claiming a binding confiscatory rate contract.

In Opelika Sewer Company vs. City of Opelika, 280 Fed. 155, the Court held that a constitutional provision of Alabama prevented a municipality of that State from making a binding rate contract.

In the City and County of Denver vs. Stenger, 277 Fed. 965, the United States Circuit Court of Appeals held that a constitutional provision of Colorado, similar to that of Georgia, prevented a municipality from making a binding rate contract. To the same effect:

City of New Orleans vs. O'Keefe, 280 Fed. 92.

City of Mitchell vs. Board of R. R. Commissioners, 184 N. W. 246.

STREET RAILWAY COMPANIES HAVE NO POWER OR AUTHORITY TO ENTER INTO BINDING RATE CONTRACTS.

Public utilities are incorporated for the purpose of serving the public, impartially, equally, without preference, and without discrimination, and therefore cannot enforce a claimed rate contract which prevents it from fulfilling the very purpose of its incorporation.

Thomas vs. United States, 101 U. S. 74 (4).

Article 4, Section 2, Paragraph 1 of the Constitution of the State of Georgia provides: "The power and authority of regulating railroad freights and passenger tariffs, preventing unjust discriminations, and requiring **reasonable** and **just** rates of freight and passenger tariffs are hereby conferred upon the General Assembly."

This power (to fix rates) is reserved by the Constitution to the state.

Georgia Railway & Power Company vs. Town of Decatur, 152 Ga. 143, 146.

In Wyndotte Gas Co. vs. Kansas, 231 U. S. 622, the Court held that a statute giving a municipality the right to contract for reasonable and just rates prevented the enforcement of a rate when it became too high. Since the power was to make **reasonable** and **just** rates, the parties were unable to contract for **unreasonable** rates.

Similarly, the Georgia constitutional provision supra, "preventing unjust discrimination, and requiring **reasonable** and **just** rates of passenger tariffs" has the same effect. The municipality can no more enforce the discriminatory and confiscatory rate in the case at bar, than could the Gas Company in the Wyndotte case.

If the street railway and municipality each had express power to make rate contracts, this Georgia constitutional provision would have prevented the enforcement of an unjust, unreasonable and discriminatory rate.

This question cannot be better expressed than by paraphrazing the language of this Court on page 630 (231 U. S.); in the face of such a plain manifestation of the constitutional will, it would be a departure from the obvious intention of the purpose of the law maker to hold that the constitution permitted the legislature to confer the power to do that which the text makes it apparent there was a dominant and fixed purpose of the constitution to forbid. See also

Tampa Water Works Co. vs. Tampa, 199 U. S. 241-242.

State vs. St. Louis S. W. Ry. Co., 197 S. W. 1006.

The Georgia Constitution, Article 4, Section 2, Paragraph 2 is as follows:

"The exercise of the police power of the State shall never be abridged, nor so construed as to permit corpo-

rations to conduct their business in such a manner as to infringe the equal rights of individuals, or the general well being of the State."

This provision also prevents the railway company from making a binding rate contract.

City and County of Denver vs. Steenger, 277 Fed. 865.

Opelika Sewer Co. vs. City of Opelika, 280 Fed 155.

O'Keefe vs. City of New Orleans, 273 Fed. 560, affirmed 280 Fed. 92.

CLAIMED RATE PROVISION TERMINATED PRIOR TO INSTITUTION OF PRESENT SUIT.

(a) By adequate notice of its termination.

Where there is no constitutional inhibition, a state may by express language grant a municipality the power to make rate contracts for a limited time, not too long extended.

Home Tel. & Tel. Company vs. Los Angeles, 211 U. S. 265.

This Court has in no instance upheld City-made rate contracts of indefinite duration or unreasonably extended.

By State action the claimed contract had become not only confiscatory but discriminatory, the continuance of which "necessarily would have engendered the enforcement of two rates of fare over the same line leading to consequences dangerous to public interest, peace and tranquility, the extent of which it would be difficult in advance to perceive."

City of Cleveland vs. Cleveland City Railway Co., 194 U. S. 517, 531.

Following the declaration of the Railroad Commission that the Decatur rate was confiscatory and discriminatory and beyond its power to change (Record page 244 Exhibit C), the railway companies on October 5th, 1920, gave notice that the claimed rate would be terminated on the 20th of October, 1920 (Record pages 58, 59). thus terminating the rate.

Bearden Merc. Co. vs. Madison Oil Co., 128 Ga. 703

Risley vs. City of Utica, 179 Fed. 875 (4), 885.

RATE CONTRACTS INDEFINITE AS TO DURATION—TERMINABLE UPON REASONABLE NOTICE.

The rate provision of 1903 was indefinite as to duration and therefore terminable upon notice.

In the case of Texas Railway Company vs. City of Marshall, 136 U. S. 393, the City of Marshall gave the railroad company $300,000.00 in county bonds, and 66 acres of land in the city limits, in consideration that the company would permanently establish its western terminus, and maintain therein its machine shops and car works; this Court held that the contract was **performed** when the company had complied with it for a period of eight years, and until its interest and the public demand required the removal of the terminus and machine shops to some other place.

In case of Jones vs. Newport News & M. Co., 66 Fed. 736, 741 (2), Chief Justice Taft, dealing with a contract to maintain a switch, said:

> "The petition makes no better case for the plaintiff on the theory of a contract than on a common law liability. It is not alleged that either the defendant or its predecessor agreed to keep the switch in the main line for any definite length of time, or that either ex-

pressly agreed to keep it there forever. The plaintiff contends that, nothing having been said as to the time, the implication is that the switch is to be maintained at all times, i. e., forever. Such a construction is quite at variance with the views of the Supreme Court as expressed in Texas & P. Ry. Co. vs. City of Marshall, 136 U. S., 393."

See also

Risley vs. City of Utica, 179 Fed. 873 (4), 885.

Western Union Tel. Co. vs. Pennsylvania, 125 Fed. 76.

Texas Ry. Co. vs. Scott, 77 Fed. 726 (2).

McCullough-Dalzell Crucible Co. vs. Philadelphia, 72 Atl. 633.

RATE PROVISION TERMINATED BY ACTION OF THE STATE.

The rate in question was terminated by the action of the State, through its commission, by making further compliance with the 5 cents fare discriminatory and illegal.

The orders of the Commission, increasing the fare to 6 and then to 7 cents, were equivalent to an Act of the Legislature making such increases.

Arkadelphia Milling Co. vs. St. Louis S. W. R. Co., 249 U. S. 134.

Oklahoma Operating Co. vs. Lane, 252 U. S. 331, 335.

These acts of the State made the 5 cents North Decatur fare unjustly discriminatory for it permitted the North Decatur traffic to ride for 5 cents and other passengers using the same cars, riding a less distance, are charged 7 cents.

City of Cleveland vs. Cleveland City Ry. Co., 194 U. S. 517.

State Ex Rel vs. Omaha, C. B. & C. R. Co., 52, L. R. A. 315.

The Commission of Georgia expressly held, thereby establishing the fact (which is also admitted by demurrer) that the North Decatur rate was unjustly discriminatory.

Manufacturers Co. vs. United States, 246 U. S. 457, 481, 482.

That the Commission had no power itself to correct such discrimination did not in any way effect the discriminatory and illegal character of the rate.

Houston E. & W. T. R. Co. vs. United States, 234 U. S. 342.

When a rate contract becomes unjustly discriminatory, because of other rates fixed by State action, the discriminatory rate contract cannot be used either as a sword for offense, or a shield of defense, for it then comes under the ban of the common law.

Postal Cable Tel. Co. vs. Cumberland Tel. & Tel. Co., 177 Fed. 726, 728;

and Georgia Constitution and legislative provisions.

FORBIDDEN BY THE CONSTITUTION OF THE STATE OF GEORGIA.

In the Constitution of the State of Georgia the following provisions appear:

Sec. 6463: "The power and authority of regulating railroad freights and passenger tariffs, preventing un-

just discriminations and requiring reasonable and just rates of freight and passenger tariffs are hereby conferred upon the General Assembly, whose duty it shall be to pass laws, from time to time, to regulate freight and passenger tariffs, to prohibit unjust discriminations on the various railroads of this State, and to prohibit said roads from charging other than just and reasonable rates, and enforce the same by adequate penalties."

Sec. 6464: " * * * the exercise of the police power of the State shall never be abridged, nor so construed as to permit corporations to conduct their business in such a manner as to infringe the equal rights of individuals, or the general well-being of the State."

Sec. 6467: "No railroad company shall give or pay any rebate, or bonus in the nature thereof, directly or indirectly, or do any act to mislead or deceive the public as to the real rates charged or received for freights or passage; and any such payments shall be illegal and void; and these prohibitions shall be enforced by suitable penalties."

These constitutional provisions in and of themselves render discriminatory rate contracts illegal and unenforceable.

Rhode Island vs. Palmer, 253 U. S. 250, 386, 387 (6, 7).

Tampa Water Works Co. vs. Tampa, 199 U. S. 241.

State vs. St. Louis S. W. Ry. Co. of Texas, 197 S. W. 1006.

California Adjustment Co. vs. Southern Pac. Co., 266 Fed. 349.

Hurley vs. Big Sandy, Etc., R. Co., 137 Ky. 216.

Gandolfo vs. Hartman, 49 Fed. 181.

Altenberg vs. Grant, 85 Fed. 345.

FORBIDDEN BY THE STATUTE LAW OF GEORGIA.

Code Sections 2628 and 2629 are as follows:

> "If any railroad corporation organized or doing business in this State under any act of incorporation or general law of this State now in force or which may hereafter be enacted, or any railroad corporation organized or which may hereafter be organized under the laws of any other State, and doing business in this State, shall charge, collect, demand, or receive more than a fair and reasonable rate of toll or compensation for the transportation of passengers or freight of any description, or for the use and transportation of any railroad car upon its track, or any of its branches thereof, or upon any railroad within this State which it has the right, license, or permission to use, operate, or control, the same shall be deemed guilty of extortion, and, upon conviction thereof, shall be dealt with as hereinafter provided."

> "If any railroad corporation as aforesaid shall make any unjust discrimination in the rate or charges of toll or any compensation for the transportation of passengers or freights of any description, or for the use of transportation of any railroad car upon its said road, or upon any of the branches thereof, or upon any railroad connected therewith, which it has the right, license or permission to operate, or use within this State, the same shall be deemed guilty of having violated the provisions of this article, and, upon conviction thereof, shall be dealt with as hereinafter provided."

Under these statutes and the Constitution of the State, the North Decatur 5 cents fare is none the less discriminatory because fixed by a claimed contract.

> Portland Railway Light & Power Co. vs. R. R. Commission of Oregon, 229 U. S. 397, 414.

The Commission had been given no power or authority to remove this discrimination, but the fact of unjust discrimination being established, the Courts have jurisdiction to end it.

Houston East & West Ry. Co. vs. United States, 234 U. S. 342.

Am. Ry. Express Company vs. South Dakota, 244 U. S. 617.

Tift et al. vs. Southern Ry. Co. et al., 123 Fed. 789 (5).

The Court can remove the discrimination by raising North Decatur rates to that fixed by the Commission.

American Ry. Express Co. vs. South Dakota, 244 U. S. 617.

A RATE NON-DISCRIMINATORY WHEN EXECUTED MAY SUBSEQUENTLY BECOME AN ILLEGAL AND DISCRIMINATORY RATE.

It is not enough that the rates were claimed to be non-discriminatory in 1903. A rate contract, valid when made, may become illegal.

Armour Packing Co. vs. United States, 209 U. S. 56.

Louisville & Nashville R. R. Co. vs. Mottley, 219 U. S. 467; see page 484.

Elliott Machine Co. vs. Center, 227 Fed. 124, 126.

Leonard vs. American Life & Annuity Co., 138 Ga., 274, 276.

When the State of Georgia fixed rates elsewhere which rendered the North Decatur rate discriminatory, the ordinance or 1903 having become discriminatory and confisca-

tory by state action, was unenforceable as a valid rate contract.

Leonard vs. American Life & Annuity Co., 139 Ga. 274, 276.

Raymond Lumber Company vs. Raymond L. & W. C., L. R. A. 1917C page 574.

McLendon vs. City of LaGrange, 107 Ga. 357.

RATE CONTRACT TERMINATED BY STATE ACTION MAKING RATE CONFISCATORY AS WELL AS DISCRIMINATORY.

In this discussion the various orders of the Commission are to be taken, as the court took them below, in the demurrer, as valid.

The order of the Commission of September 22nd, 1920, increased the quality and quantity of street railway service with reference to North Decatur traffic. (Record p. 245.)

These orders increased the cost of serving North Decatur traffic, thereby making the 5 cents fare confiscatory.

Mississippi R. Co. vs. Mobile & O. R. Co., 244 U. S., 388.

Washington & P. C. Ry. Co. vs. Magruder, et al., 198 Fed. 218 (3).

Union Dry Goods Co. vs. Public Service Corp., 142 Ga. 841, 846.

The inability of the Commission to change the rate does not prevent the Court from declaring the rate unconstitutional, and in violation of the Fourteenth Amendment of the Constitution of the United States. Even if the Commission had fixed the rate the Courts can be appealed to.

Chicago Ry. Co. vs. Minnesota, 134 U. S. 418, 458.

Reagan vs. Farmers' Loan & Trust Company, 154 U. S. 326.

Smyth vs. Ames, 169 U. S. 466, 526.

The Commission fixed an integral part of the rate when it required increased transportation and service.

Mississippi R. Co. vs. Mobile & O. R. Co., 244 U. S. 388.

Washington & P. C. Ry. Co. vs. Magruder, et al., 198 Fed. 318 (3).

The fact that the deficiency in North Decatur traffic is made up by requiring other passengers to pay higher rates does not prevent the claimed contract rate, plus the transportation service required, being unconstitutional and confiscatory.

Vandalia Railroad Co. vs. Schnull, 255 U. S. 113.
N. & W. Ry. Co. vs. W. Va., 236 U. S. 605.
No. Pac. Ry. Co. vs. North Dakota, 236 U. S. 585.

Some of the intervenors are parties living upon the North Decatur line, but not in Decatur. If the deficiency of the North Decatur service be made up by charging these intervenors a higher rate of fare their property would be confiscated.

Vandalia Railroad Co. vs. Schnull, 255 U. S. 113, 118.

RATE PROVISION TERMINATED BY LEGISLATIVE ACTS OF GEORGIA EXTENDING TERRITORIAL LIMITS.

When the claimed contract provision was passed in 1903 the incorporate limits of Decatur included only a small part of the North Decatur line.

The Legislature (Georgia Laws 1914, page 703, and 1916, page 681) extended the limits of Decatur towards the City of Atlanta, thereby taking in about a mile of the North Decatur line not theretofore in the limits of the municipality. The State Court held that these Legislative Acts extended the 5 cents rate to all passengers leaving or boarding cars within this added territory, thus increasing the number of passengers to be served at the confiscatory rate, and increasing the losses theretofore sustained.

On the line of reasoning adopted by the Court, the Legislature, by appropriate extension of Decatur to take in all the lines of the street railway, would apply to them this 5 cents confiscatory fare. The Legislative Acts in question, thus being construed, increased the service to be rendered for the claimed 5 cents fare, making such rate confiscatory.

II.

SECOND ASSIGNMENT OF ERROR.

In the second assignment of error (Record p. 6 (2) this brief, page 16 supra) intervenors attacked further compliance with this 5 cents fare, in that it denies to them and all other patrons of the railway company (other than the North Decatur traffic) the equal protection of the law guaranteed by the Fourteenth Amendment of the Constitution of the United States, for that the intervenors pay 7 cents

fare for less service, while the North Decatur patrons enjoy 5 cents fare for a greater transportation service.

The intervenors claim a separate and independent right to have this fare declared unconstitutional. The North Decatur patrons pay 5 cents, whereas the intervenors on the same cars, for less service, pay a Legislative fixed rate of 7 cents. The Legislature could have given the Commission jurisdiction over this 5 cents rate, its failure to do so was a Legislative recognition of such rate.

If the Legislature had, itself, fixed a 7 cents fare on all the Decatur lines, except for such passengers as embarked or disembarked in Decatur on the North Decatur line, and had for them fixed a 5 cents fare, there could have been no question but that the intervenors had been denied the equal protection of the law guaranteed by the Fourteenth Amendment of the Constitution of the United States.

Cotting vs. Goddard, 183 U. S. 79.

Gulf C. & S. F. R. Co. vs. Ellis, 165 U. S. 150, 159.

Yick Wo vs. Hopkins, 118 U. S. 356.

Connally vs. Union Sewer Pipe Co., 184 U. S. 539, 556.

The intervenors were not parties to the Decatur contract. The Legislative rate is binding upon them. That fact renders a municipal rate unconstitutional when attacked by them. The intervenors are not inhabitants of Decatur and the Municipality cannot bind them by illegal and discriminatory contract rates.

The above discussion, under the first assignment of error, though not repeated, is applicable here.

III.

THIRD ASSIGNMENT OF ERROR

In section (a) of the third assignment of error (Record p. 6 and 7, also in brief pages 16) the Act of the State of Georgia of 1907, pages 73 et seq., amended by the laws of 1919, page 94, as construed and enforced by the State Courts is attacked as being violative of the Fourteenth Amendment to the Constitution of the United States, in that there is no reasonable classification with reference to contracts excepted and those placed under the Commission's jurisdiction.

The Railroad Commission of the State of Georgia was created by the Acts of 1878-79, page 125 et seq., and would have applied to street railway companies had not the Act expressly excluded them.

> Savannah Railway Company vs. Williams, 117 Ga. 420.

The Acts of 1907, page 73 et seq., extended the powers of the Railroad Commission over street railways. The first part of Section 5 of this act, now embodied in Section 2630 of the Code of Georgia, provided: "The power to determine what are just and reasonable rates and charges is vested exclusively in said Commission."

A part of Section 5, of said same Act, now Code Section 2662, provides: "The powers and duties heretofore conferred by law upon the Railroad Commission are hereby extended and enlarged, so that its authority and control shall extend to street railroads, and street railroad corporations, companies, or persons owning, leasing or operating street railroads in this State. Provided, however, that nothing herein shall be construed to impair any valid subsisting contract

now in existence between any municipality and any such company."

The Act of August 18th, 1919, page 94, amended Code Section 2662 by adding at the end thereof the following provision, to-wit:

> "Provided that the above proviso, to-wit: 'that nothing herein shall be construed to impair any valid, subsisting contract now in existence between any municipality and any such company,' shall not apply to any suburban and street railroad company which has its principal office and operates lines of railroads in counties having a population of not less than 75,000 and not more than 125,000 population."

In the mandamus case, and in the case at bar, the railway companies contended that the fixing of rates by the Commission would not impair the obligations of the contract, because under the decisions of this Court, the changing of contract rate by the Commission would not impair the obligations of such contract, even though the contract had been made prior to the statute creating the Commission.

> Producers Trans. Co., vs. Railroad Commission of Cal., 251 U. S. 228, 232.
>
> City of Englewood vs. Denver S. P. Ry Co., 248 U. S. 294.

The State Court held, however, that the claimed contract provision deprived the Commission of jurisdiction to fix rates in Decatur on the North Decatur line.

> Georgia Railway & Power Company vs. Railroad Commission of Georgia, 149 Ga. 1.

The fixing of the street railway fares, falling under the jurisdiction of the Railroad Commission, after that decision

caused the discrimination and illegality of the North Decatur rate.

It is immaterial whether the Act or the proviso or exceptions to the Act was or was not considered constitutional when the Act was passed. The Act or the proviso may become unconstitutional as the result of future developments, or the method of enforcing it, or future construction of the Act by the highest State Court.

> Municipal Gas Co. vs. Public Service Commission, 225 N. Y. 89, 121 N. E. 772.
>
> Castle vs. Massa, 91 Ohio State, 296, 110 N. E. 464.

Taking the State Court's construction there is no legal or reasonable classification as to the contracts excepted and those placed under the Railroad Commission's jurisdiction. Reasonable classification does not deny equal protection of the law, but one based on no adequate reason is invalid.

> Kansas City So. Ry. Co. vs. Road District, 256 U. S. 658.

The Act as thus amended, and as construed by the State Court, only excepted from the Commission's jurisdiction rate provisions as to fares made prior to 1907 by a municipality (not for itself but for individuals) where the street railway company has its principal office and operates lines of railroad in counties having a population of less than 75,000 and more than 125,000.

It conferred jurisdiction upon the Commission to change or alter rates though fixed in any other contracts, whether made prior or subsequent to 1907. It is, therefore, evident that the Legislature did not undertake to make a classification based on the time of the execution of the contract.

It did not undertake to make a separate classification of municipal contracts for some made prior to 1907, and all made subsequent thereto are placed under the Commission's jurisdiction.

It included under the Commission's jurisdiction all rate contracts made by individuals for themselves.

Union Dry Goods Co. vs. Public Service Corporation, 142 Ga. 841, 846.

When the Act gave the Commission jurisdiction to change rates fixed in contracts made by individuals for themselves, it could not except from the Commission's jurisdiction a similar rate contract made by a municipality for other individuals.

No legal or reasonable classification exists as to municipal rates, merely because the principal office of the street railway company may happen to be located in a county having under 75,000 or over 125,000 population, and those whose principal office is located in a county having a population between 75,000 and 125,000; the first being held as being excluded from the jurisdiction of the Commission and the latter as included.

The Act of 1907, with its proviso, as construed by the State Court, makes no reasonable classification as to rate contracts; the Act and the orders of the Commission establish a discriminatory scheme of rates and recognizes no distinction as to the Commission's power to regulate the quality and quantity of service, whether the rate for the service is placed within or without the Commission's jurisdiction.

Lake Shore & Michigan So. Ry. Co. vs. Smith, 173 U. S. 684.

Chicago, R. I. & P. Ry. Co., vs. Ketchum, 212 Fed. 896.

Leonard vs. Am. Life & Annuity Company, 139 Ga. 274 (5); 277 (5).

Traux vs. Corrigna, 257 U. S. 312.

When the Legislature is empowered to place all rate contracts under the Commission's jurisdiction it cannot place some and except others within the same class and relating to the same service, without rendering said Act unconstitutional and violative of the Fourteenth Amendment of the Constitution of the United States.

Cotting vs. Goddard, 183 U. S., 79.

Gulf, Colorado & Santa Fe Ry. Co. vs. Ellis, 165 U. S. 150, 165.

Connolly vs. Union Sewer Pipe Co., 184 U. S. 539, 556. Yick Wo vs. Hopkins, 118 U. S. 356.

Louisville & N. R. Co. vs. Railroad Commission of Tenn., 19 Fed. 697.

Western Ry. of Ala. vs. Railroad Commission of Ala., 197 Fed. 954 (5 and 6), page 973.

SUB-PARAGRAPH (C) OF THE THIRD ASSIGNMENT OF ERROR.

This assignment attacks the Act of 1907, as establishing a discriminatory scheme of rates as against the intervenors, the case supra controlling on this assignment of error.

SUB-PARAGRAPH (B) OF THE THIRD ASSIGNMENT OF ERROR.

(Record, page 7, this brief page 17 supra). Now the State Court holds that the Act of 1907 supra withholds from the Commission any authority to change the rate of fare

of 1903, but that said Act conferred on the Commission authority to increase the quantity and quality of service rendered thereon. That under the said Act as Commission (a) can require the issuance of free transfers; (b) make the rate operative from all parts of Decatur to all points in Atlanta; (c) increase the quality and quantity of service; although it could not change the 5 cents fare. These orders of the Commission greatly increased the cost of the North Decatur service, so as to make the actual cost 9.29 cents per passenger. Such orders unconstitutionally confiscate the property of the street railway companies.

Mississippi R. R. Com. vs. Mobile R. Co., 244 U. S. 388.

Washington & P. C. Ry. Co. vs. Magruder, 198 Fed. 218 (3, 4).

Giving such construction and effect to this Act, is unconstitutional.

Detroit Union Ry. Co. vs. Michigan, 242 U. S. 238.

IV. AND V.

FOURTH AND FIFTH ASSIGNMENTS OF ERROR.

(Record p. 8, in this brief, pages 18, 19.)

The State Court held that the rate provision of the ordinance of 1903 was a valid and binding contract, and taken as such it suspended, during the life of the contract, all governmental powers which affect the rate of fare in question.

Home Tel. & Tel. Co. vs. Los Angeles, 211 U. S. 265.

No obligation whatever is found in the College Park ordinance (Discussed in case No. 464) requiring the giving of transfers.

The orders of the Commission of April 2nd, 1919, requiring free transfers on payment of a five cents fare, unconstitutionally impaired the obligations of that contract.

Detroit United Ry. Co. vs. Michigan, 248 U. S. 429, 436, 437.

The ordinance in this case (while mentioning transfers) does not cover the fare to be paid to obtain a transfer. (Record page 166). The order of the Commission of September 22nd, 1920, required an increase in the quantity and quality of service not provided for in the contract. (See order record page 244; 245). Each of these orders of the Commission are violative of Article 1, Section 10, of the Constitution of the United States.

These orders of the Commission were passed under and by virtue of the Legislative Act of the State of Georgia (Acts 1907, page 73 et seq.)

The judgment of the court in sustaining the general demurrers to the answers and cross bills as amended gave effect to the said orders of the Commission, and to the Act under which it was held that the Commission had jurisdiction to pass such orders.

Detroit United Railway Co. vs. Michigan, 242 U. S. 238.

Louisiana Ry. Co. vs. Behrman, 235 U. S. 164, 170.

Mississippi Railroad Commission vs. Mobile R. Co., 244 U. S. 388.

Washington & P. C. Ry. Co. vs. Magruder, 198 Fed. 218 (3, 4).

VI.

SIXTH ASSIGNMENT OF ERROR

The assignment of error here raised also attacks the Acts of the State of Georgia (Georgia Laws 1914, page 703, and 1916, page 681), in that said Acts unconstitutionally impair the obligations of the contract of 1903 and impairs the previous contract entered into between the County of DeKalb and the electric company.

When the fare contract of 1903 was entered into, only a small part of the North Decatur line was situated in Decatur. Giving that contract its widest construction it only applied to that part of the line **then** within the corporate limits of the municipality.

The Acts of 1914 and 1916 (Georgia Laws 1914, page 703, and 1916, page 681) extended the limits of Decatur toward Atlanta, taking in about a mile of the North Decatur line theretofore built under the contracts with the county of DeKalb.

The action of the Court in sustaining the demurrer and its refusal to give written request to charge (page 30 of the Record) made applicable the 5 cents fare to this annexed territory.

The judgment of the Court below requiring 5 cents rate of fare over this portion of the line rests under these Acts extending the territory. It follows, therefore, that these Acts, and the effect given to them, impair the contract of the Street Railway Company with the County of DeKalb, and also adds to the burden of the contract of 1903, in violation of Article 1, Section 10 of the Constitution of the United States.

Detroit United Railway Co. vs. Michigan, 242 U. S. 238.

United States vs. Memphis, 97 U. S. 284.

It is not necessary that the State Court's decision mention said Acts since its decision gave effect to them.

Houston vs. Texas C. Rd. Co., 177 U. S. 66, 67.

Columbus Ry G Va S C (No 297) decided by Court July 19-1923

VII.

SEVENTH ASSIGNMENT OF ERROR.

(Record page 9, 10; page brief 21). In the answers and cross bills as amended there was an express offer to surrender all the rights and privileges as to the North Decatur line within the corporate limits of the municipality, if the fare provision of 1903 was held to be legal and enforceable. This 5 cents fare is confiscatory in that it deprives the Street Railway Company of a fair return on its property used in furnishing the service and pays only about one-half the operating cost of furnishing said service.

It is contended that if the rate provision could not otherwise be repudiated, the street railway had the right to surrender and forfeit its privilege of operating said line within Decatur.

Therefore, the street railway desired to surrender all its rights within the municipality, and asked that it be allowed to cease operations thereon.

A public utility corporation has the right to surrender its franchise within a municipality.

Fletcher on Corporations, Section 1777, page 2130.

Fletcher on Corporations, Section 4425, page 7718.

There is no provision in the claimed contract between the railway company and Decatur that the Street Railway Company is perpetually to operate its lines in Decatur. If there had been it could have been terminated under the facts set out in the answers and cross bills as amended.

Texas & P. Ry. Co. vs. City of Marshall, 136 U. S. 393.

The Street Railway Company cannot be compelled to perpetually carry North Decatur traffic at a loss.

Vandalia R. R. Co. vs. Schnull, 255 U. S. 113.

Brooks-Scanlon Co. vs. R. R. Com. of La., 251 U. S. 291; 399.

North. Pac. Ry. Co. vs. North Dakota, 236 U. S. 585.

Norfolk & Western Ry. Co. vs. West Virginia, 236 U. S. 605.

The deficiency could not legally be made up by increasing the fare to be charged other passengers of the Street Railway Company.

Vandalia R. R. vs. Schnull, 255 U. S. 113.

The Railroad Commission cannot increase the quantity and quality of North Decatur service, and put the cost of such service upon other patrons, or upon intervenors, for that would be compelling them to pay a higher rate for their

service, and their property would be unconstitutionally confiscated.

Vandalia R. R. Co. vs. Schnull, 255 U. S. 113, 118.

Respectfully Submitted,

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Attorneys for Plaintiffs in Error
and
Petitioners in Certiorari.

Atlanta, Ga., March 17, 1923.

No. 463

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921

GEORGIA RAILWAY & POWER COMPANY, ET AL.
Petitioners

vs.

TOWN OF DECATUR,
Respondent

PETITION FOR CERTIORARI
BRIEF AND MOTION

LUTHER Z. ROSSER
J. PRINCE WEBSTER
WALTER T. COLQUITT
Attorneys for Petitioners

IN THE

Supreme Court of the United States

October Term, 1921

GEORGIA RAILWAY & POWER CO., GEORGIA RAILWAY & ELECTRIC CO., R. C. HACKMAN, C. H. KNOX, G. R. MacNAMARA, J. T. BRASWELL, C. A. VIRGIN, J. D. MALSBY, C. M. BINDER, J. L. MURPHY, J. R. HARDIN, H. M. ASHE, P. E. DAVIS, C. E. BENNETT, W. E. FIELD, H. E. HAWN, DAVID HAWN, F. McDONALD, JR., and J. C. GORMAN,

Petitioners

vs.

TOWN OF DECATUR,

Respondent.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

The petition of Georgia Railway & Power Company, Georgia Railway & Electric Company, R. C. Hackman, C. H. Knox, G. R. MacNamara, J. T. Braswell, C. A. Virgin, J. D. Malsby, C. M. Binder, J. L. Murphy, J. R. Hardin, H. M. Ashe, P. E. Davis, C. E. Bennett, W. E. Field, H. E. Hawn, David

Hawn, F. McDonald, Jr., and J. C. Gorman, respectfully shows:

1.

The Town of Decatur (a municipal corporation of the State of Georgia) brought an equitable petition against Georgia Railway & Power Company, individually and as lessor of Georgia Railway & Electric Company, seeking to enjoin the street railway companies from increasing fares, as to the North Decatur line, of passengers boarding or alighting from cars within the corporate limits of the town of Decatur, from five cents per passenger to seven cents per passenger, claiming that:

(a) All lines of street railways had been placed under the jurisdiction of the Railroad Commission by the act of the Georgia legislature of 1907, with the exception stated in the following proviso: "Provided, however, that nothing herein shall be construed to impair any valid, subsisting contract now in existence between any municipality and any such company."

(b) That on the —— day of April, 1918, the Railroad Commission of Georgia declared its lack of jurisdiction to fix fares upon all of the lines of said street railway companies, including the North Decatur line, upon the ground that the lines of said companies fell within the proviso of the act of 1907, supra.

(c) That said railway companies, by mandamus proceedings in the Supreme Court of Georgia, reversed this ruling of the Railroad Commission,

directing them to fix fares upon all of the lines of said companies except as to that part of the College Park line included within the corporate limits of the City of College Park and that part of the North Decatur line situated within the corporate limits of the Town of Decatur. (149 Ga. 1.) This exemption was based upon the ground that the City of College Park and the Town of Decatur had contracts falling within the proviso of the act of 1907, supra.

(d) That by reason of the allegations supra (a) to (c) inclusive the Town of Decatur had a valid perpetual contract by which said street railway companies were never to charge passengers on the North Decatur line, alighting from or boarding cars within the corporate limits of the Town of Decatur, more than five cents per passenger.

2.

Respondent further sought to enjoin the street railway companies from discontinuing the giving of transfers on the North Decatur line to passengers boarding cars within the limits of the Town of Decatur for all other lines of railway in the City of Atlanta, claiming that it has always been the custom of said railways to give transfers under certain conditions to passengers on their other lines, and that the Railroad Commission had, on April 19, 1919, ordered the railway companies to continue issuing transfers to patrons on the North Decatur line within the limits of the Town of Decatur, just as they were issued to patrons on other lines of said companies.

3.

The fact that said railway companies had notified respondent that they would increase fares to seven cents on October 10, 1920, was given as the immediate need for the injunction.

4.

The railway companies showed cause and defended by answers and demurrers, substantially as follows:

(a) The railway companies furnished the railway system for the City of Atlanta and vicinity, 157 miles of their railway being in the City of Atlanta; their full mileage being 212 miles of single track.

(b) That the North Decatur line, 5.93 miles in length, begins in the City of Atlanta at corner of North Pryor and Edgewood Avenue; and runs over various streets of the city, both in Fulton and DeKalb Counties, to what was formerly the Town of Edgewood, to the corporate limits of the city; thence over a private right of way to the corporate limits of the Town of Decatur, as they existed prior to 1914, a distance of 5.424 miles; thence the line makes a loop in the Town of Decatur, coming back to the main line from Atlanta at McDonough Street. Said street railway companies also own another line between Atlanta and Decatur, known as the South Decatur line, which runs along the South side of the Georgia Railroad practically parallel to, and but a short distance from, the North Decatur line, which runs North of the Georgia Railroad; the terminii of

these two lines, both in Decatur and in Atlanta, being very near together.

(c) That prior to the 2nd day of April, 1919, and prior to the rendition of the decision in 149 Ga. 1, said street railway companies charged a uniform fare of five cents per passenger, with transfers upon uniform conditions.

(d) On said last named date the Railroad Commission of Georgia, after a full hearing, increased the rate of fare to six cents per passenger, except as to the College Park line within the limits of College Park and the North Decatur line within the limits of Decatur. After this order of the Commission a six-cents fare was charged upon all the street railway lines except those stated.

(e) On September 22, 1920, the Georgia Railroad Commission, upon further hearing, fixed a seven-cents fare on all lines of the railway companies except as to College Park and the North Decatur line, as above stated. In rendering this seven-cents order, the Commission said:

> "The five-cent fare now in effect on the Main Decatur and College Park lines, contracted for under vastly different conditions than now exist, are not fairly compensatory, and, as to the patrons of the company on other routes, are discriminatory. This Commission is without authority to increase them."

In the same order, said Commission increased both

the quantity and quality of service to be rendered the North Decatur traffic.

(f) That the ordinance of March, 1903, if valid as a contract and binding upon the railway companies, provides for a five-cents fare only upon the North Decatur line for one passenger and one trip upon its regular cars from the terminus of said line in the City of Atlanta to the Terminus of the same line in the Town of Decatur, and the trip either way shall include the entire loop in the town of Decatur, and from no other point in the Town of Decatur, and from no other point in the City of Atlanta, or elsewhere, to any other point in the Town of Decatur.

(g) That if the fare provision in the ordinance of March, 1903, be construed as an ordinance regulating and fixing fares, or be construed as a contract for fares, it is void in either instance because of lack of authority in the Town of Decatur to make such contracts or pass such ordinances, and for lack of authority in the street railway companies to make such contracts.

(h) If the rate ordinance above referred to be construed as a contract, and as valid in its inception, it was terminated by the notice given by the railway companies; and it is discriminatory in that it discriminates in favor of all passengers boarding or alighting from the cars on the North Decatur line within the limits of the Town of Decatur; those so boarding and alighting being charged only five cents, and all other passengers on the North Decatur line being charged seven cents; and it was further

illegal at its inception, not only for lack of statutory authority to make the contract but as being in violation of Sections 6389, 6464 and 6467, of the Code of 1914 of the State of Georgia.

(i) If said rate ordinance is construed to be a contract, it has been revoked by the State of Georgia, through the Railroad Commission of said State, by adding to the contract by increasing the quantity and quality of service to be performed under said claimed contract.

(j) By the acts of the legislature (Acts 1914, p. 703, and Acts 1916, p. 681), the corporate limits of the Town of Decatur were extended towards the City of Atlanta, so as to include a part of the North Decatur line built upon the private way of the railways, and which was, therefore, not included in the rate ordinance of 1903.

(k) Under the Constitution of the State of Georgia, the General Assembly may not authorize the construction of any street passenger railway within the corporate limits of any town or city without the consent of the municipal authorities. The North Decatur line was originally constructed under the consent, or franchise, of the City of Atlanta, the Town of Edgewood, the Town of Kirkwood, and the County of DeKalb. In none of these franchises was there any provision for a five-cents fare.

(l) The cost of the service to patrons boarding or alighting from cars on the North Decatur line within the corporate limits of the Town of Decatur is 13.956 cents per passenger, and said service is not,

and never will be, within the five cents now charged.

(m) On October 5, 1920, the stret railway companies notified the Town of Decatur that from and after October 20, 1920, the claimed five-cents fare provision of the ordinance of March, 1903, would be terminated.

(n) The rate provision of the ordinance of 1903 confiscates the property of the railway companies and is, therefore, unconstitutional and violative of the Fourteenth Amendment to the Constitution of the United States, in that it deprives the street railway companies of their property without due process of law, and denies to all patrons of said railway companies, except the North Decatur patrons, including the intervenors herein, the equal protection of the laws, in that the North Decatur patrons pay five cents and all the other patrons pay seven cents.

The legislative act of the State of Georgia (Acts 1907, page 73, et seq.), amendmed by the Act of August 18, 1919 (Acts 1919, page 94), is unconstitutional and violative of the Fourteenth Amendment to the Constitution of the United States, in that it denies to each of petitioners the equal protection of the laws and fixes a discriminatory and illegal scheme of rates, in that said act places under the jurisdiction of the Railroad Commission of Georgia the authority to change rates fixed in all contracts except valid, subsisting contracts in existence on August 23, 1907, between any municipality and any street railway company having its principal office and operating lines of railroad in counties having a population of more than 75,000 and less than 125,000.

It further violates the Fourteenth Amendment to the Constitution of the United States by depriving the petitioning railways of their property without due process of law, in that it deprives the Railroad Commission of the power to change rates as just above stated, and confers upon said Commission the power to increase the quality and quantity of service rendered and the power to command the issuance of transfers by said railway companies.

(o) The Act of 1907 (Acts 1907, page 73, et seq) violates the Fourteenth Amendment to the Constitution of the United States in that under and by virtue of said act, power and authority are conferred upon the Railroad Commission of Georgia to fix a seven-cents rate of fare for a less or similar service rendered to all other persons and patrons, and a five-cents rate of fare for North Decatur patrons for a greater and similar service.

(p) If the rate provision of the ordinance of 1903 is a contract between the Town of Decature and the street railway companies, then the Act of 1907 (Acts 1907, p. 73 et seq.), when construed as permitting the Railroad Commission of Georgia to add to the contract by increasing the quantity and quality of service, impairs the obligations of the contract between the parties, in violation of Article 1, Section 10, of the Constitution of the United States.

(q) If the rate provision of the ordinance of 1903 be held by the Court to be a contract, then the Court should further hold that the act of 1907 (Acts 1907, p. 73 et seq.) and the orders of the Commission

making the five-cents fare provision operative on the North Decatur line from points in Atlanta other than from the terminus of the North Decatur line to the Town of Decatur, and from points in Decatur other than the terminus of said line to the City of Atlanta, then said Act and orders impair the obligations of said contract, in violation of Article 1, Section 10, of the Constitution of the United States.

(r) If the fare provision of the ordinance of 1903 constitutes a contract, and if the acts of 1914 and 1916, supra, increasing the limits of the Town of Decatur, have thereby added to the five-cents zone, then said Acts violate Article 1, Section 10, of the Constitution of the United States: (1) In that they extend the five-cents fare provision of the contract to territory added to the Town of Decature after the execution of the contract; (2) in that the County of DeKalb granted a franchise to the railway companies, under and by virtue of which the railway tracks of said companies were laid in the public roads of DeKalb County (now included in the corporate limits of Decatur), under which the fares to be charged to patrons were not limited.

5.

The street railway companies prayed for and requested the power to abandon so much of their North Decatur line as was located in the Town of Decatur, because the operation of said line cost more than thirteen cents per passenger, and to be compelled to continue to operate said line confiscated their property, contrary to the Fourteenth Amendment o the Constitution of the United States.

6.

The individual petitioners were allowed to intervene as parties defendant. They adopted the answers and demurrers of the street railway companies, and prayed a cessation of the discrimination against themselves, and specifically raised the constitutional question, contending that enforced compliance with the ordinance of 1903 violated the Fourteenth Amendment to the Constitution of the United States as to them, in that it denied them and all other persons on the North Decatur line, except those boarding or alighting from cars within the Town of Decatur, the equal protection of the laws as therein guaranteed, in that they and others like situated were charged a fare of seven cents, while the North Decatur line patrons paid only five cents.

7.

A preliminary injunction was granted in the court below, taken up by writ of error to the Supreme Court of the State of Georgia, and the judgment of the court granting the restraining order was sustained.

8.

Thereafter final trial was had, and upon motion the trial court struck the answers and cross-bills of petitioners on general demurrer, and directed a verdict in favor of respondent, entering thereupon a decree in its favor. The effect of such decree was to sustain as legal and binding, with which compliance must be had, all the orders of the Commission and

the acts of the State attacked in the answers and cross-bills; it enforced compliance with the provisions of the ordinance of 1903, with the various acts of the State and with the orders of the Commission enlarging and extending such contract by increasing the quality and quantity of the service, and by enlarging and extending the territory to which the five-cents fare provision was to apply, and denied the right of petitioning street railway companies to give up their North Decatur franchise rights in the Town of Decatur and to cease further operation of their North Decatur line in the Town of Decatur.

9.

Petitioners submit the following reasons why the writ of certiorari should be allowed:

(a) The ordinance of 1903 is not a rate contract. It is neither in form nor substance a contract, but is an attempted ordinance which the Town of Decatur had no right to pass, seeking to regulate rates. Neither the Town of Decatur nor the street railway companies had the statutory power to make rate contracts, and had the statutory power been given them such statutes would be void, for under the Constitution of the State of Georgia the legislature alone can make rates. The legislature itself cannot make an irrevocable grant of special privileges and immunities. "The exercise of the police power of the State shall never be abridged, nor so construed as to permit corporations to conduct their business in such a way as to infringe the equal rights of individuals, or the general wellbeing of the State."

Grant that the contract was valid at its inception, it was at most a contract at will and subject to be terminated upon reasonable notice.

When the Railroad Commission increased the fares on every other part of the street railway system to six, and then seven, cents, it became discriminatory, and hence illegal. It is not contended that the State could not have revoked it at any time. Without dispute, the State did so modify it as that the petitioning railways were released from the contract, by the Commission's increasing and enlarging the quality and quantity of the service to be performed under the contract and by extending the area covered by the contract.

It is true that the Supreme Court of Georgia held that this ordinance was not a rate ordinance but a rate contract, and a valid contract. When the Fourteenth Amendment to the Constitution of the United States is appealed to, it will be determined by this Court whether the confiscatory instrument is, in fact, a rate ordinance or a rate contract. If this question is to be determined exclusively by the State Courts, then in a large measure of instances the State will for itself pass upon the Fourteenth Amendment.

(b) The enforcement of the rate ordinance of 1903 discriminates against the individual intervenors and, as to them, violates the Fourteenth Amendment to the Constitution of the United States, in that it denies to them the equal protection of the laws. They live either on the North Decatur or

South Decatur line, between the corporate limits of Atlanta and the corporate limits of the Town of Decatur. All of them pay a seven-cents fare, many of them for very short distances; the North Decatur line patrons pay five cents for the longest haul on the line.

(c) The legislative act of 1907 (Acts 1907, p. 73 et seq.), as amended in 1919, as construed by the court violates the Fourteenth Amendment to the Constitution of the United States as to all of the petitioners, in that it denies to them the equal protection of the laws and fixes a discriminatory and illegal scheme of rates. The act places under the jurisdiction of the Railroad Commission of Georgia all street railways in said State and under its terms the Commission can disregard all rate contracts in the State except valid, subsisting contracts in existence on August 23, 1907, between any municipality and any street railway having its principal office and operating lines of railroad in counties having a population of less than 75,000 and more than 125,000. This character of contract here excepted is beyond the reach and power of the Commission, no matter all other contracts, it may disregard them and fix such rates as to it may seem just and fair.

Under its operation, citizens of the Town of Decatur, on the North Decatur line, ride for five cents, when the service costs more than thirteen cents. Other citizens on the same line enjoy a much less service, but are charged seven cents. An act which establishes a scheme of rates permitting such

inequality between patrons cannot be justified by any fair system of classification.

As construed by the Court, under this act, while the Commission may not change the contract as to the rate of fare, it is here so construed by the Court as to permit the Commission to change the excepted municipal contract by adding to its terms a provision increasing the quality and quantity of service anticipated in the terms of the contract. So construed by the court, said act violates the Fourteenth Amendment to the Constitution of the United States in that it takes the property of the railway companies without due process of law.

Said act, as to the individual petitioners, fixes an illegal and discriminatory scheme of rates, in violation of the Fourteenth Amendment to the Constitution of the United States, in that the court held that under said act the Railroad Commission had the power to fix a seven-cents rate of fare for petitioners and others similarly situated, while a five-cents fare for a greater service is permitted to the North Decatur line patrons.

If the court correctly held that the rate ordinance of 1903 was a valid contract between the parties, then the legislative act of 1907 (Acts 1907, p. 73 et seq.), as construed by the court, violates Section 10, Article 1, of the Constitution of the United States. That act permits the Railroad Commission to add to the contract by increasing the quality and quantity of service as contemplated by said contract; said ad-

dition and increase being an impairment of the obligations of said rate contract.

Since the court held that the rate ordinance of 1903 was a valid and binding contract between the parties, then said Act of 1907 (Acts 1907, p. 73 et seq.), as construed by the court, violated Article 1, Section 10, of the Constitution of the United States, in that said Act permitted the Railroad Commission of Georgia to enforce a five-cents fare not only from the terminus of the North Decatur line in Atlanta to the terminus of the same line in Decatur, and from the terminus of said line in Decatur to its terminus in Atlanta, but from all points in Decatur to all points without the Town of Decatur, and from all points without to all points within the town of Decatur.

In the years 1914 and 1916, after the passage of the ordinance of 1903, the legislature enlarged the area of the Town of Decatur, extending it towards the City of Atlanta, and taking in a section of the North Decatur line not theretofore included within the limits of Decatur. The court construed said enlarging acts so as to bring the new territory under the provisions of the rate ordinance of 1903. If such rate ordinance was, in fact, a rate contract, the construction of said enlarging acts, so as to add new territory to the provisions of that contract, impaired the obligations of the contract, in violation of Article 1, Section 10, of the Constitution of the United States.

(d) The petitioning railway companies built their tracks upon the public roads of DeKalb County,

under a franchise contract with that County wherein there was no five-cents fare provisions. When the court so construed the enlarging acts of 1914 and 1916 as to apply the rate ordinance to the added territory, it so construed it as to impair the obligations of the contract between said railway companies and the County of DeKalb, in violation of Article 1, Section 10, of the Constitution of the United States.

In the cross-petition, the petitioning street railway companies, setting up that the service to each North Decatur line patron, under the rate ordinance of 1903, cost the companies more than thirteen cents, prayed that they be allowed to relinquish their franchise in the Town of Decatur and take up their tracks from its streets. The court, with the dismissal of the cross-bill, denied this right, holding that under their charters and the rate ordinance, they were bound to continue the North Decatur service, even if the result was a confiscation of their property. It is contended that, as construed by the court, the ordinance of 1903 is in violation of the Fourteenth Amendment to the Constitution of the United States. Under the provision of the Constitution, a corporation cannot be forced to dedicate its property to the public service to the destruction of its property.

10.

Petitioners further submit that this case is of great importance to the petitioning railway companies and the individual petitioners, involving a question of confiscation of the property of the public

utilities and gross discrimination against the individual petitioners.

WHEREFORE, your petitioners pray that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Supreme Court of the State of Georgia, to the end that the judgment and decree of the Supreme Court of Georgia may be reviewed and reversed by this Honorable Court.

LUTHER Z. ROSSER,
J. PRINCE WEBSTER,
WALTER T. COLQUITT,
Attorneys for Petitioners.

GEORGIA,—FULTON COUNTY.

Before me personally appears Walter T. Colquitt, who, being duly sworn, deposes and says that he is counsel for the petitioners, Georgia Railway & Power Company, Georgia Railway & Electric Company, R. C. Hackman, C. H. Knox, G. R. MacNamara, J. T. Braswell, C. A. Virgin, J. D. Malsby, C. M. Binder, J. L. Murphy, J. R. Hardin, H. M. Ashe, P. E. Davis, C. E. Bennett, W. E. Field, H. E. Hawn, David Hawn, F. McDonald, Jr., and J. C. Gorman; that he knows of the proceedings had, and that the facts stated in the foregoing petition are true and correct, to the best of his knowledge and belief.

WALTER T. COLQUITT.

Sworn to and subscribed before me, this
26th day of June, 1922.

INEZ BOINEST,
Notary Public, Fulton County, Georgia.

GEORGIA RAILWAY & POWER CO., GEORGIA RAILWAY & ELECTRIC CO., R. C. HACKMAN, C. H. KNOX, G. R. MacNAMARA, J. T. BRASWELL, C. A. VIRGIN(J. D. MALSBY, C. M. BINDER, J. L. MURPHY, J. R. HARDIN, H. M. ASHE, P. E. DAVIS, C. E. BENNETT, W. E. FIELD, H. E. HAWN, DAVID HAWN, F. McDONALD, JR., and J. C. GORMAN,

Petitioners,

vs.

TOWN OF DECATUR,

Respondent.

Petition for Certiorari.

TO THE TOWN OF DECATUR, AND J. HOWELL GREEN AND FRANK HARWELL, ITS ATTORNEYS OF RECORD:

This is to notify you, and each of you, that the above named Georgia Railway & Power Company, Georgia Railway & Electric Company, R. C. Hackman, C. H. Knox, G. R. MacNamara, J. T. Braswell, C. A. Virgin, J. D. Malsby, C. M. Binder, J. L. Murphy, J. R. Hardin, H. M. Ashe, P. E. Davis, C. E. Bennett, W. E. Field, H. E. Hawn, David Hawn, F. MacDonald, Jr., and J. C. Gorman, petitioners for certiorari, will on the 17th day of July, 1922, upon their verified petition and copy of the entire record in this case, at the opening of Court on that day, or as soon thereafter as counsel can be heard, submit a motion (a copy of which and of

the petition for writ of certiorari and brief in support of same are herewith delivered to you) to the Supreme Court of the United States in its courtroom at the Capitol, in the City of Washington.

LUTHER Z. ROSSER,
J. PRINCE WEBSTER,
WALTER T. COLQUITT,
Attorneys for Petitioners.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1921

GEORGIA RAILWAY & POWER CO., GEORGIA RAILWAY & ELECTRIC CO., and R. C. HACKMAN, C. H. KNOX, G. R. MACNAMARA, J. T. BRASWELL, C. A. VIRGIN, J. D. MALSBY, C. M. BINDER, J. L. MURPHY, J. R. HARDIN, H. M. ASHE, P. E. DAVIS, C. E. BENNETT, W. E. FIELD, H. E. HAWN, DAVID HAWN, F. McDONALD, JR., and J. C. GORMAN,

Petitioners.

Vs.

TOWN OF DECATUR,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

A full statement of the case appears in the petition for certiorari.

This case is already pending in this Court on writ of error.

Under a number of decisions of this Court, had the case arisen prior to the Act of Congress of Sep-

tember 16, 1919, amending Judicial Code 230, (changing the procedure in bringing certain questions to this Court from writ of error to certiorari) a writ of error would lie. The change in procedure made by this Act and subsequent decisions of this Court, leave counsel for petitioners in doubt as to which remedy should be followed; and they, therefore, respectfully request that the certiorari be sanctioned as prayed, so that the questions raised may be considered and determined by this Court.

FEDERAL QUESTIONS RAISED WHETHER OR NOT RATE PROVISION IS HELD TO BE A CONTRACT

Whether the rate provisions of the ordinance of to wit, March 3, 1903, and the acceptance thereof on April 1, 1903, is held to be a binding rate contract, or merely a rate ordinance, federal questions, for judicial determination by this Court, are raised.

If it is held to be a contract the constitutional question is raised that subsequent statutes of the State of Georgia and orders of the Railroad Commission of Georgia unconstitutionally impair its obligations in violation of Article 1, Section 10 of the Constitution of the United States.

If it is held to be a rate ordinance then constitutional questions are raised, that it violates the 14th Amendment of the Constitution of the United States; for the 5 cents rate provision therein contained is admittedly confiscatory and discrimina-

tory; and has been expressly so held and declared by the Railroad Commission of the State of Georgia.

This is a typical case for the exercise of the jurisdiction of this Court under a long line of decisions.

When the contract clause of the United States Constitution is invoked, this Court determines for itself (1) Is there a contract? (2) If so, what obligation arose from it? (3) Has that obligation been impaired by subsequent legislation?

> Detroit United Railway Co. vs. Michigan, 242 U. S. 238, 249.
>
> Milwaukee Electric Ry. Co. vs. Wisconsin, 252 U. S. 100, 103.
>
> Stearns vs. State of Minnesota, 179 U. S. 223, 232.

This Court determines the question of whether or not there is a contract, for itself, and in deciding it may even reverse the State court's construction of the State Constitution.

> University vs. People, 99 U. S. 309, 323.

The reason for this rule, as stated by this Court, is that an erroneous decision by the State Court might defeat the federal jurisdiction and absolutely deprive a party of a constitutional right guaranteed to him by the Constitution of the United States.

Similarly, when the 14th Amendment of the Constitution of the United States is invoked against an

ordinance, confessedly discriminatory and confiscatory and the claim is made that it is binding as a contract, this Court has the jurisdiction to determine for itself whether there is a contract, its meaning, validity and extent, and if held to be a mere ordinance or legislative act, whether its discriminatory or confiscatory character violates the 14th Amendment of the Constitution of the United States. Otherwise, a State court (similarly as when the impairment of a contract clause of the United States Constitution is invoked) by holding an ordinance or statute to be a contract might absolutely deprive a party of the constitutional guarantee against the confiscation of his property, and securing the equal protection of the law.

San Antonio vs. San Antonio Pub. Service Co., 255 U. S. 547.

Southern Iowa Elec. Co. vs. Chariton, 255 U. S. 539.

As the impairment of the obligation of the contract clause of the United States (Article 1, Section 10) is invoked and questions as to the violation of the 14th Amendment of the Constitution of the United States are raised, the federal question is made as to whether or not the rate provision of the ordinance of March 3, 1903, and the acceptance thereof on April 1, 1903, is or is not a contract.

The determination of this question is, in and of itself, a federal question.

Hoadley's Administrator vs. San Francisco, 124 U. S. 639, 645.

CONTENTION THAT RATE PROVISION IS NOT A CONTRACT.

To show that under the decisions of this Court a substantial federal question is raised; that the rate ordinance of March 3rd, 1903, and the acceptance thereof on April 1, 1903, is not a contract, we briefly call attention to some of the decisions of this Court sustaining the contention of petitioners that no binding rate contract exists.

As the parties to the claimed rate contract have no explicit, express or implied constitutional or legislative authority to make binding rate contracts, the ordinance is not a contract.

Home Tel. & Tel. Co. vs. Los Angeles, 211 U. S. 265.

Milwaukee Elec. Ry. Co. vs. Wisconsin, 238 U. S. 174.

City of Englewood vs. Denver A. S. P. Ry. Co., 248 U. S. 294.

San Antonio vs. San Antonio Pub. Service Co., 255 U. S. 547.

Southern Iowa Elec. Co. vs. Chariton, 255 U. S. 539.

Georgia Constitutional provision (Code Section 6389) forbidding making irrevocable grants of special privileges or immunities, prevents the ordinance from being a contract.

San Antonio vs. San Antonio Pub. Service Co., 255 U. S. 547.

Similarly, Georgia Constitution provision (Code Section 6464)—"the exercise of the police power of the State shall never be abridged, nor so construed as to permit corporations to conduct their business in such a manner as to infringe the equal rights of individuals, or the general well-being of the State," prevents ordinance from being a rate contract.

O'Keefe vs. City of New Orleans, 273 Fed. Rep. 560.

State action subsequent to March 3rd, 1903, and April 1, 1903, made the rate provision illegal and unenforceable. Action by the State of Georgia, through the Railroad Commission of the State of Georgia, subsequent to March 3rd, and April 1, 1903, renders the rate provisions discriminatory and violative of the constitutional provisions of the State of Georgia (Code Section 6463) prohibiting unjust discrimination, and Code Section 6467 and 6469 making discrimination (directly or indirectly) exercised by a Railroad Company unconstitutional and void.

Rate provision is now unenforceable under the general principles of law and under the 14th Amendment of the United States Constitution in that it and the rates established by the State of Georgia over other portions of the same line have the effect of establishing two different rates over the same line, charging Decatur patrons a lesser fare for the greater or similar service under the rate provision of March 3, 1903, and April 1, 1903, than charged other patrons for the same or less service, under the State fixed rates.

As held by this Court in 194 U. S. 517, the enforcement of two such different rates over the same line lead to consequences dangerous to the public interest, peace and tranquility, the extent of which it is difficult to perceive.

Discriminatory rate contracts always and everywhere void and unenforceable.

> Portland Railway & Light Co. vs. Oregon, 229 U. S. 397.
>
> Portland Railway & Light Co. vs. Oregon, 229 U. S. 414.

Such being the evil effect of the further performance of the rate provision of March 3, 1903, and acceptance thereof on April 1, 1903, under the decisions of this Court it has either been sufficiently performed as a contract, or it has been terminated by the Railway Company by notice.

> Texas, etc., Ry. Co. vs. Marshall, 136 U. S. 393.

It is held by the State court that the State, at any time, can terminate or confer power upon the Railroad Commission to change the rate provision in question. As such provision is not binding on the State it is unilateral and being confessedly confiscatory and discriminatory cannot be enforced against the street railway companies, and the individual intervenors.

> Central Power Co. vs. City of Kearney, 274 Fed. Rep. 253 (2) and cases cited.

San Antonio vs. San Antonio Pub. Service Co., 255 U. S. 547, 558.

It has been terminated as a contract by notice, as the rate provision contained no specific time it was to continue.

Jones vs. Newport News, 65 Fed. 736.

City of Utica vs. Cons. Water Co., 179 Fed. 875.

Western Union Tel. Co. vs. Pennsylvania Co., 125 Fed. 67.

Texas & P. Ry. Co. vs. Scott, 77 Fed. Rep. 726.

If the Court holds the rate provision is not a binding valid rate contract; the federal question is made that as a rate ordinance it violates the 14th Amendment of the Consitution of the United States.

TREATING RATE ORDINANCE OF MARCH 3, 1903, AND ACCEPTANCE THEREON ON APRIL 1, 1903, AS A CONTRACT.

If the rate ordinance of March 3, 1903, and acceptance thereof on April 1, 1903, is held to be a contract the jurisdiction of this Court is invoked to determine what obligations arose from it and whether these obligations have been impaired.

The amount of the impairment is immaterial, if there is any, it is sufficient to bring into activity the judicial power of this Court.

Farrington vs. Terry, 95 U. S. 693.

The Acts of the Legislature of Georgia (Georgia Laws, 1914, page 703, and Georgia Laws, 1916, page 618) extended the corporate limits of Decatur towards the City of Atlanta, so as to include part of the Main or North Decatur line built on a private right of way, owned by the street railway company, and under a franchise granted by the County of DeKalb. But for these annexation Acts the 5 cents rate of fare of the contract of March 3, 1903, and acceptance thereof on April 1, 1903, would not apply to such added portion of the line, but there would be an undisputed right resting under the franchise contract with DeKalb County to charge 7 cents over this portion of the line. It is only because of these subsequent legislative acts that this is prevented. That is the effect given to this act. The judgment of the court below requiring a 5 cents rate of fare over this portion of the line rests on this act; without the act such judgment would not and could not have been rendered. It will thus be seen that this act and the effect given it impairs the contract right held by the street railway companies with DeKalb County and also adds to the contract of March 3, 1903, and the acceptance thereof on April 1, 1903, in violation of Article 1, Section 10 of the Constitution of the United States.

Detroit United Ry. Co. vs. Michigan, 242 U. S. 238.

United States vs. Memphis, 97 U. S. 284.

That the decision of the State court may not mention the Act in question is immaterial as the decision itself gave effect to the annexation acts.

Houston vs. Texas C. Rd. Co. vs. Texas, 177 U. S. 66, 77.

Similarly, the contract of April 1, 1903, does not require the issuing of transfers from all points in Decatur to all points in Atlanta for 5 cents, but the orders of the Railroad Commission of the State of Georgia require the issuing of universal transfers for the 5 cents fare to any party boarding the line within the present limits of the Town of Decatur, although under the commission's orders as to transfers all other patrons (other than the Decatur patrons) pay 7 cents before they can receive a transfer. The Commission's order thus unconstitutionally impairs the obligation of the contract by adding to its burdens.

Detroit United Ry. Co. vs. Michigan, 248 U. S. 429, 436, 437.

Similarly, the Railroad Commission of Georgia by its order extends the 5 cents fare provision to other points than called for by the contract and also, by its orders, the quality and quantity of service is increased beyond that contemplated and required by the contract.

These different commission's orders are attacked as violative of Article 1, Section 10 of the Constitution of the United States, as they are the same as legislative acts.

Arkadelphia Milling Co. vs. St. L. S. S. W. Ry. Co., 249 U. S. 134.

OTHER FEDERAL QUESTIONS RAISED.

The Acts of 1907, page 73 et seq., are construed by the State Court as conferring jurisdiction upon the Commission to issue the orders attacked. It is only because of this act, that the State Court holds the Commission had power and authority to pass the orders in question, giving such construction and effect to this Act; the Act is attacked as impairing the obligations of the contract in violation of Article 1, Section 10 of the Constitution of the United States; a federal question for determination by this Court.

Detroit United Railway Co. vs. Michigan, 242 U. S. 238.

The federal question is further raised that the Act of 1907, page 73 et seq., as construed by the State court, violates the 14th Amendment of the Constitution of the United States, in that said Act denies the Railroad Commission of the State of Georgia power to change the 5 cents rate of fare in the contract, although it confers upon the commission the power to increase the quality and quantity of service, and to require the issuing of transfers; and gives the commission jurisdiction to make the rate of fare provided for in the contract, operative from other points from that specified in the rate contract. The Act thus construed confiscates the property of the Street Railway Company.

Mississippi Railroad Commission vs. Mobile R. Co., 244 U. S. 388.

Washington & C. Ry. Co. vs. Macgruder, 198 Fed. 218 (3, 4).

Similarly each of the orders of the Commission complained of unconstitutionally confiscates the property of the street railway companies. (244 U. S. 388; 198 Fed. Rep. 218 (3, 4).

If the Railroad Commission increases the rate of fare of other patrons because of their confiscatory orders as to Deactur traffic, the individual intervenors are denied the equal protection of the law and their property is confiscated in violation of the 14th Amendment of the United States Constitution. The individual intervenors contend that the Act of 1907, page 73 et seq., and the orders of the Georgia Railroad Commission unconstitutionally discriminate against them.

The federal question is raised that the Act of 1907 page 73 et seq., amended by the Act of August 18, 1919 (Georgia laws, 1919, page 94), as construed by the State court is class legislation in violation of the 14th Amendment of the Constitution of the United States.

It is unquestioned that the Legislature of the State of Georgia can place all rates and rate contracts under the jurisdiction of the railroad commission of the State of Georgia. Legislative discrimination and class legislation is produced by the Act in question by placing some contracts and withholding others (without distinction as to classification) under the jurisdiction of the Railroad Commission of the State of Georgia.

> Traux vs. Corrigan, Co-Op. Advance Sheets, January 16th, 1922, page 132 (see pages 139-142).

Advance sheets, Supreme Court, January 16, 1922, page 124.

Lake Shore & Michigan So. Ry. vs. Smith, 173 U. S. 684.

Chicago R. I. & P. Ry. Co. vs. Ketchum, 212 Fed. 986.

L. & N. R. R. Co. vs. R. R. Com. of Tenn., 19 Fed. 693, 695.

Cotting vs. Goddard, 183 U. S. 79.

Union Sewer Pipe Co. vs. Connelly, 99 Fed. 354, affirmed in 184 U. S. 548.

Western Ry. of Ala. vs. Rd. Com. of Ala., 197 Fed. Rep 954 (5, 6).

Gulf Colorado & Santa Fe Ry. Co. vs. Ellis, 165 U. S. 150, 165.

On the other hand if the rate provision of March 3rd, 1903, and acceptance of April 1, 1903, could be held to be a separate and distinct classification of rates and service, the federal question is raised that petitioners are deprived of their property in violation of the 14th Amendment of the Constitution of the United States; for that such effect is given to the contract as to compel the street railway company perpetually to carry the Decatur traffic at a confiscatory rate, though the contract had no specific time of duration and the electric companies seek to rescind and give up all its rights under and by virtue of the contract and remove its Main or North Decatur line from Decatur.

Vandalia R. R. Co. vs. Schnull, 255 U. S. 131.

Brooks-Scanlon Co. vs. R. R. Com. of La., 251 U. S. 291, 399.

Detroit V. Ry. vs. People of State of Michigan, 238 U. S. 340, 346.

See also:

Jones vs. Newport News & M. V. Co., 65 Fed. Rep. 736, 741.

WALTER T. COLQUITT,
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J. PRINCE WEBSTER,
Attorneys for Petitioners.

The foregoing notice is hereby accepted and delivery of a copy thereof and the petition for certiorari and brief in support of the petition, are hereby acknowledged. This June 26th, 1922.

J. HOWELL GREEN,
HARWELL, FAIRMAN & BARRETT,
FRANK HARWELL,
Attorneys for Town of Decatur.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1921.

GEORGIA RAILWAY & POWER CO., GEORGIA RAILWAY & ELECTRIC CO., and R. C. HACKMAN, C. H. KNOX, G. R. MACNAMARA, J. T. BRASWELL, C. A. VIRGIN, J. D. MALSBY, C. M. BINDER, J. L. MURPHY, J. R. HARDIN, H. M. ASHE, P. E. DAVIS, C. E. BENNETT, W. E. FIELD, H. E. HAWN, DAVID HAWN, F. McDONALD, JR., and J. C. GORMAN,

Petitioners,

Vs.

TOWN OF DECATUR,

Respondent.

Come now the above named petitioners, by their Counsel, and move this Honorable Court that it shall, by certiorari or other proper process, directed to the Supreme Court of the State of Georgia, require said Court to certify to this Court for its review and determination, a certain cause in said Supreme Court of Georgia lately pending, wherein Petitioners above named were the Plaintiffs in Error, and the above named Respondent, was the Defendant in Error, and to that end they now tender herewith their petition

and brief, with a certified copy of the entire record in said Supreme Court of Georgia.

WALTER T. COLQUITT,
LUTHER Z. ROSSER,
J. PRINCE WEBSTER,
Attorneys for Petitioners.